

United States
Circuit Court of Appeals

For the Ninth Circuit. 12

CRYSTAL COPPER COMPANY, a Corporation,
Plaintiff in Error,
vs.

PETE GAIDO and BATT TAMIETTI,
Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Montana.

FILED
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Amended Complaint	2
Answer	27
Answer of the Court to the Writ of Error....	218
Assignment of Errors.....	206
Bill of Exceptions	47
Certificate of Clerk U. S. District Court to Transcript of Record	224
Citation on Writ of Error.....	219

EXHIBITS:

Plaintiffs' Exhibit "A"—Ore Settlement Sheets of American Smelting and Re- fining Company	62
Plaintiffs' Exhibit "B"—Check Dated February 1, 1922, Issued to Batt Tami- etti by Crystal Copper Company.....	91
Plaintiffs' Exhibit "E"—Ore Settlement Sheet of American Smelting and Re- fining Company and Washoe Sampler of Anaconda Copper Mining Company	76
Plaintiffs' Exhibit "I"—Ore Settlement Sheet of American Smelting and Re- fining Company—Dated August 22, 1921	85

	Index.	Page
EXHIBITS—Continued:		
Plaintiffs' Exhibit "O"—Ore Settlement Sheets of American Smelting and Re- fining Company		148
Plaintiffs' Exhibit "Q"—Ore Settlement Sheets of Anaconda Copper Mining Company—Washoe Sampler		158
Plaintiffs' Exhibit "R"—Ore Settlement Sheets of Anaconda Copper Mining Company—Washoe Sampler		164
Defendant's Exhibit "J"—Check Dated March 4, 1922, Matt W. Alderson to Lawrence monsanti		131
Defendant's Exhibit "K"—Receipt Dated March 4, 1922, Lawrence Mozetti to Matt W. Alderson.....		131
Defendant's Exhibit "L"—Check Dated March 4, 1922, Crystal Copper Com- pany to Lawrence Monsanti.....		132
Defendant's Exhibit "M"—Check Dated February 1, 1922, Crystal Copper Com- pany to Lawrence Mansanti.....		132
Defendant's Exhibit "N"—Receipt Dated March 4, 1922, Lawrence Mozetti to Crystal Copper Company.....		133
Defendant's Exhibit "P"—Testimony of Matt. W. Alderson Given at a Former Trial		135
Instructions of Court to the Jury.....		186
Judgment		41
Names and Addresses of Attorneys of Record..		1

Index.	Page
Order Allowing Writ of Error.....	215
Order Extending Time to File Bill of Excep- tions Thirty Days	41
Petition for Writ of Error.....	213
Praecipe for Transcript of Record.....	223
Prayer for Reversal of Judgment.....	204
Proposed Amendments to Bill of Exceptions..	43
Reply	34
Requested Instructions by Defendant.....	200
Supersedeas Bond	221
TESTIMONY ON BEHALF OF PLAIN- TIFFS:	
CLEMENT, HARRISON E.....	129
Recalled	147
GIADO, PETER	119
Cross-examination	127
Redirect Examination	129
MONZETTI, LAWRENCE	105
Cross-examination	113
PENNINGTON, W. W.....	102
Examination by Mr. Walker.....	102
RICHARDS, W. R.....	117
Cross-examination	118
TAMIETTI, BATT	48
Cross-examination	98
Redirect Examination	100
Recalled in Rebuttal	180
TAMIETTI, FRANK	156
Cross-examination	169

	Index.	Page
TESTIMONY ON BEHALF OF DEFEND- ANT:		
FLAHERTY, JOSEPH V.		134
MONZETTI, LAWRENCE		176
Recalled—Cross-examination		176
Redirect Examination		177
PAGLEERO, JOHN		174
Cross-examination		175
TAMIETTI, FRANK		173
Trial—December 3, 1924.....		36
Trial (Continued—December 4, 1924)		37
Trial (Continued—December 5, 1924)		39
Verdict		202
Writ of Error.....		216

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OF RECORD.

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In the District Court of the United States in and
for the District of Montana.

No. 362.

LAWRENCE MONZETTI, PETE GAIDO, BATT
TAMIETTI, JOHN PAGLEERO, and
FRANK TAMIETTI,
Plaintiffs,

vs.

CRYSTAL COPPER COMPANY, a Corporation,
Defendant.

BE IT REMEMBERED, that on the 28th day of
November, 1923, an amended complaint was filed
herein, which said amended complaint is in the
words and figures as follows, to wit: [1*]

*Page-number appearing at foot of page of original certified Trans-
cript of Record.

In the District Court of the United States, in and
for the District of Montana.

No. 362.

LAWRENCE MONZETTI, PETE GAIDO, BATT
TAMIETTI, JOHN PAGLEERO, and
FRANK TAMIETTI,

Plaintiffs,

vs.

CRYSTAL COPPER COMPANY, a Corporation,
Defendant.

AMENDED COMPLAINT.

Come now the plaintiffs above named, by leave of Court first had and obtained, make, enter and file this their amended complaint, and for cause of action, complain of the defendant and allege:

1.

That the defendant, Crystal Copper Company, is and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Maine, with full power and authority to engage in mining and leasing and subleasing mining property and its mining property, and engaged in mining ores in the County of Silver Bow, State of Montana, and subleasing certain portions of the Goldsmith Mine, as hereinafter mentioned; that the said defendant is and at all of the times herein mentioned was a citizen and resident of the State of Maine; that said defendant at all of said times had and now has a certified copy of its

Articles of Incorporation filed in each of the following offices, to wit: Secretary of State of Montana and County Clerk and Recorder of Silver Bow County, State of Montana; and that Matt W. Alderson was at all the times herein mentioned the duly appointed, qualified and acting process agent for said defendant; and that Batt Tamietti and Lawrence Monzetti, plaintiffs are, and at all of said times [2] herein mentioned were citizens and residents of the State of Montana; that plaintiffs, Pete Gaido, John Pagleero and Frank Tamietti are, and at all times herein mentioned were, subjects of the Kingdom of Italy and residents of the State of Montana.

2.

That there is, and at all times herein mentioned was, a quartz mine known as the Goldsmith Mine located north of Butte, in the County of Silver Bow, State of Montana; that said mine extends in an easterly and westerly direction of about 1500 feet and in a northerly and southerly direction of about 600 feet, and that in said Goldsmith Mine there is, and at all the times herein mentioned was a level known and designated as the 500 foot level; and that in said Goldsmith Mine there is, and at all of said times was a shaft commonly known and designated as No. 1 shaft, and is, and at all of the times herein mentioned was, the only shaft in said mine used to hoist and lower men working in said mine, to lower timber, hoist ore and lower other supplies used in connection with the operation of said mine; that said shaft at all of the times herein mentioned

was in the possession of and under the charge and control of said defendant; that in said mine there is, and at all of the times herein mentioned was, a lead at and below said 500 foot level running in an easterly and westerly direction, commonly known and designated as the North Lead in said mine; that in said North Lead about 1000 feet in a north-westerly direction from said No. 1 Shaft there was on or about the 26th day of June, 1921, a certain winze about 35 feet deep from and under the 500 foot level of said mine.

3.

That the defendant, Crystal Copper Company, is, and at all times herein mentioned was, engaged in mining ores at the said Goldsmith Mine under a certain lease with the owners of the Goldsmith Mine in the County of Silver Bow, [3] State of Montana, and had full power and authority under said lease to sublease and grant to miners all the ores in any part or portion of said mine with the right in said miners to the exclusive possession and exclusive right to work such parts or portions of said mine, as they were granted by said defendant.

4.

That one Matt W. Alderson is, and at all times herein mentioned was the general manager and superintendent of the defendant, Crystal Copper Company, with full power, authority, charge, control, superintendency and management of said mine for said company, and with full power and authority from said company to sublease and grant to miners all the ores in any part or portion of said mine with

the right in such miners to the exclusive possession and exclusive right to work such parts or portions of said mine, as they were granted by said defendant.

5.

That the plaintiffs, Lawrence Monzetti, Pete Gaido, Batt Tamietti, John Pagleero and Frank Tamietti, are, and at all times herein mentioned were mining copartners in mine subleasing from said defendant.

6.

That on or about the 26th day of June, 1921, the above-named plaintiffs as aforesaid entered into an oral lease with the defendant for a certain portion of said Goldsmith Mine, to wit: 50 feet downward in said winze along the said North Lead from and under the 500 foot level of said mine approximately 1000 feet in a northwesterly direction from said No. 1 shaft, and easterly along the said lead to the east boundary line of said mine, and westerly to the west boundary line of said mine.

7.

That the terms and conditions of said sublease were, and are as follows, to wit: The plaintiffs were to enter in [4] and upon said property and commence work, and to continue to work in said winze and sink the said winze to a depth of about 50 feet and search for marketable ores; that in consideration of the work to be performed by the said plaintiffs, the said defendant granted the said plaintiffs the exclusive right of possession of said winze and any drifts, cross-cuts and stopes from said winze the

said plaintiffs would make in the above-described portion of said mine, and granted the said plaintiffs all the commercial ores they would discover in said winze to the depth of 50 feet and all commercial ore discovered in any and all drifts, cross-cuts and stopes from said winze to the depth of 50 feet within the boundary lines of said mine and up to the 500 foot level of said mine, with the exclusive right to mine and remove any and all ores discovered by the said plaintiffs from said winze and any drifts, cross-cuts, and stopes the said plaintiffs would make, in the above-described portion of said mine, and the said defendant was to furnish all explosives, all tools and timber needed, without charge to the plaintiffs outside of the royalties hereinafter mentioned, and to hoist and lower plaintiffs and their servants whenever necessary and to hoist all waste and ore which the plaintiffs delivered to the shaft on said 500 foot level in said mine in full carloads from said winze, drifts, cross-cuts and stopes without charge to plaintiffs outside of the royalties hereinafter mentioned; that on all ores shipped by the said lessees under said sublease the following deductions were to be made, to wit, freight charges on all the ores shipped to the smelter, and on all ores assaying up to \$25.00 per ton, 11½% royalty; from \$25.00 to \$50.00 per ton 23% royalty; from \$50.00 to \$100.00 per ton 34½% royalty; from \$100.00 to \$200.00 per ton 46% royalty; from \$200.00 and up per ton 57½% royalty to the owners of the Goldsmith Mine, [5] and 50% of the net balance was to go to the plaintiffs and 50% to defendant.

8.

That plaintiffs, Lawrence Monzetti, Pete Gaido, Batt Tamietti and John Pagleero, duly entered in and upon said mine on or about the 26th day of June, 1921, commenced sinking the said winze and continued to sink the said winze upon the terms and conditions aforesaid, pumping all water, doing all work that was necessary, including timbering and mining, until they had sunk said winze to a depth of about 50 feet.

9.

That the said defendant then and there on or about the 20th day of July, 1921, and after plaintiffs had discovered a vein of commercial ore in said lead running in an easterly and westerly course, orally agreed with the said plaintiffs to grant, and did grant, an extension of territory to the said plaintiffs to be mined by them in consideration that the said plaintiffs sink the said winze to a deeper depth, and that said plaintiffs were to have the exclusive right to all ores they discovered between the bottom of the said winze, when sunk to a deeper depth, up to the 500 foot level and within the boundary lines of said mine upon the same terms, conditions and royalties as aforesaid, and exclusive possession of said portion of said mine.

10.

That at all times hereinbefore mentioned, plaintiff, Frank Tamietti, had been sick and ill and unable to work in or upon said lease, all of which the said defendant had had notice of and had consented to the absence of the said plaintiff, Frank Tamietti;

that on or about the 20th day of July, 1921, after having recovered from said illness, with the consent of the defendant the said plaintiff, Frank Tamietti, commenced working in and upon said lease with plaintiffs, Lawrence Monzetti, Pete Gaido, Batt Tamietti, and John Pagleero as [6] copartner with said plaintiffs.

11.

That the said plaintiffs pursuant to the aforesaid sublease and extension thereto; then and there on or about the 20th day of July, 1921, commenced sinking the said winze to a deeper depth than 50 feet, until they had reached the depth of about 75 feet and had struck a fault in said lead; that the said plaintiffs and lessees sank a sump in said winze about 6 feet deep and then commenced drifting east and west from said winze upon said vein of ore in said lead, and drifted for a distance of about 100 feet east, until they had come to a point where the ore in said vein ceased to be commercial in value; that the said plaintiffs and lessees then returned to the winze and commenced stoping and breaking ore and stoped up about 20 feet from the bottom of said winze and about 20 feet east from said winze; that then and there at the request of said defendant and under an oral agreement with the said defendant, the said plaintiffs were granted an extension of said lease by said defendant, wherein and whereby the said plaintiffs and lessees were to have, in addition to the territory already granted them, the exclusive right to mine all ores they would discover by cross-cutting north into the footwall of said lead, between the

boundary lines of said mine and the bottom of said winze and the 500 foot level of said mine, and exclusive possession of the same upon the aforesaid terms, conditions and royalties; that said plaintiffs commenced cross-cutting from the bottom of said drift north into the footwall of said lead and cross-cutted about 15 feet into another vein in said lead and struck rich and valuable ore which assayed and assays on the average of about 37 ounces of silver per [7] ton and about \$7.00 in gold per ton; that the ore in the first vein mentioned herein assayed and assays on the average of about 70 ounces of silver per ton and about \$11.00 in gold per ton; that the vein in the footwall of said lead is on the average of about 3 feet wide and that the vein in the hanging-wall of said lead is on the average of about 3 feet wide.

12.

That in accordance with the above terms, conditions, and royalties said plaintiffs and lessees shipped 10 cars of ore from said lease to the smelter on and between the 10th day of August, 1921, and the 3d day of March, 1922; that on or about the 31st day of December, 1921, the plaintiffs and defendant had made full settlement on the first eight cars of ore shipped to the smelter and that defendant thereby ratified the terms and conditions of said sublease and extensions thereof; that on or about the 31st day of January, 1922, the defendant received smelter returns and settlement from the smelter upon the ninth car that was shipped to the smelter by plaintiffs from said lease, and that on or

about the 3d day of March, 1922, the defendant received smelter returns and settlement from smelter on the 10th car that was shipped by plaintiffs from said lease; that \$122.86 on the said last two cars of ore shipped by plaintiffs from said lease to the smelter was withheld by defendant from said plaintiffs, that \$100.00 of said sum was withheld to pay for 400 shares of stock in the defendant corporation, that plaintiffs had heretofore purchased from defendant; that defendant failed, neglected and refused and ever since the 3d day of March, 1922, has failed, neglected and refused to deliver to plaintiffs the said 400 shares of stock heretofore paid for, and that there is a balance of Twenty-two and 86/100 (\$22.86) Dollars due, owing and unpaid the plaintiffs by the said defendant [8] upon said ninth and tenth cars of ore shipped by plaintiffs to the smelter from said lease.

13.

That the plaintiffs, Lawrence Monzetti, Pete Gaido, Batt Tamietti and John Pagleero worked continuously under the said sublease and the said extension thereto from the 26th day of June, 1921, until the 16th day of January, 1922, and that plaintiff, Frank Tamietti, worked continuously under the said sublease and the said extensions thereto from on or about the 20th day of July, 1921, until the 16th day of January, 1922; that the defendant then and there on or about the 16th day of January, 1922, arbitrarily ejected the plaintiffs, Lawrence Monzetti, Pete Gaido and Batt Tamietti, without cause, from said property, and arbitrarily refused to per-

mit the plaintiffs to go on with the said sublease, without cause, or to enter in or upon the said property, and arbitrarily cancelled and rescinded the said sublease of plaintiffs, without cause; that plaintiffs were at all times herein mentioned, able, ready and willing to go on with the said sublease, had they been permitted to do so by defendant.

14.

That there were about 1000 tons of ore averaging 70 ounces of silver per ton and \$11.00 in gold per ton or of the value of \$81.00 per ton in the vein of ore on the hanging-wall side of said lead, between the bottom of said winze and the 500 foot level of said mine, and the east and west line of said mine yet to be mined on said date, January 16, 1922, that could and would have been mined by said plaintiffs and lessees within 30 days from and after the said sixteenth day of January, 1922, if the said defendant had not interfered with the said plaintiffs [9] and lessees, and arbitrarily cancelled and rescinded the said sublease, without cause, that the said plaintiffs and lessees were and are entitled to under said sublease to mine and ship to the smelter under the terms, conditions and royalties of the aforesaid sublease, and that these plaintiffs would have realized on said ore a net profit to themselves of Sixteen and 67/100 (\$16.67) Dollars per ton; and that there were approximately one thousand (1000) tons of ore to be mined in the footwall of said lead between the bottom of said winze and the 500 foot level of said mine, and the east and west lines of said mine, which could and would have been mined by said plaintiffs

and lessees within a period of ninety days from and after the 16th day of January, 1922, if the said defendant had not interfered with said lessees and arbitrarily cancelled and rescinded the said sublease, without cause as aforesaid; that said plaintiffs and lessees were and are entitled under said sublease to mine and ship to the smelter under the terms, conditions and royalties of the aforesaid sublease, which would have averaged about 37 ounces of silver per ton and about \$7.00 in gold per ton or of the value of \$42.00 per ton for said ore, which said lessees could have mined at a net profit of Twelve and 50/100 (\$12.50) Dollars per ton to said plaintiffs under the terms and conditions of said sublease.

15.

That by reason of the said arbitrary cancellation and rescission of said sublease, without cause, and the arbitrary ejection of the said plaintiffs, Lawrence Monzetti, Pete Gaido and Batt Tamietti, from said property by the defendant, without cause, as aforesaid, and the arbitrary refusal of the defendant to permit the plaintiffs to go on with said sublease and enter in and upon the said property as aforesaid, without cause, the plaintiffs have been damaged in the sum of Twenty-two Thousand One Hundred Sixty-six and 67/100 (\$22,166.67) Dollars, no part of [10] which has been paid; that the cancellation of said sublease and the ejection of the said plaintiffs, Lawrence Monzetti, Pete Gaido and Batt Tamietti, from said property and the refusal as aforesaid of said defendant to permit plaintiffs to go on with

the said sublease was arbitrary on the part of the defendant, and without cause.

WHEREFORE, plaintiffs pray judgment against the defendant upon this first cause of action for the sum of Twenty-two Thousand One Hundred Sixty-six and 67/100 (\$22,166.67) Dollars damages, together with costs of suit and for such other and further relief as to the Court may seem meet and just.

SECOND CAUSE OF ACTION.

For a second cause of action the plaintiffs complain of the defendant and for cause of action allege:

1.

That the defendant, Crystal Copper Company, is and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Maine, with full power and authority to engage in mining, and leasing, subleasing mining property and its mining property, and engaged in mining ores in the County of Silver Bow, State of Montana, and subleasing certain portions of the Goldsmith Mine, as hereinafter mentioned; that the said defendant is and at all of the times herein mentioned was a citizen and resident of the State of Maine; that said defendant at all of said times had and now has a certified copy of its Articles of Incorporation filed in each of the following offices, to wit: Secretary of State of Montana and County Clerk and Recorder of Silver Bow County, State of Montana; and that Matt W. Alderson was at all the times herein mentioned the duly

appointed, qualified and acting process agent for said [11] defendant; and that Batt Tamietti and Lawrence Monzetti, plaintiffs, are, and at all of said times herein mentioned were citizens and residents of the State of Montana; that plaintiffs, Pete Gaido, John Pagleero and Frank Tamietti are, and at all times herein mentioned were, subjects of the Kingdom of *Itaho* and residents of the State of Montana.

2.

That there is and at all times herein mentioned was a quartz mine known as the Goldsmith Mine located north of Butte, in the county of Silver Bow, State of Montana; that said mine extends in an easterly and westerly direction of about 1500 feet and in a northerly and southerly direction of about 600 feet, and that in said Goldsmith Mine there is, and at all of the times herein mentioned was a level known and designated as the 500 foot level; and that in said Goldsmith Mine there is, and at all of said times was a shaft commonly known and designated as No. 1 shaft, and is, and at all of the times herein mentioned was the only shaft in said mine used to hoist and lower men working in said mine, to lower timber, hoist ore and lower other supplies used in connection with the operation of said mine; that said shaft at all of the times herein mentioned was in the possession of and under the charge and control of said defendant; that in said mine there is, and at all of the times herein mentioned was a lead at and below said 500 foot level running in an easterly and westerly direction, commonly known and designated as the North Lead

in said mine; that in said North Lead about 1000 feet in a northwesterly direction from said No. 1 shaft there was on or about the 26th day of June, 1921, a certain winze about 35 feet deep from and under the 500 foot level of said mine.

3.

That the defendant, Crystal Copper Company is, and at all times herein mentioned was engaged in mining ores at the said Goldsmith Mine under a certain lease with the owners [12] of the Goldsmith Mine in the county of Silver Bow, State of Montana, and had full power and authority under said lease to sublease and grant to miners all the ores in any part or portion of said mine with the right in said miners to the exclusive possession and exclusive right to work such parts or portions of said mine, as they were granted by said defendant.

4.

That one Matt W. Alderson is, and at all times herein mentioned was the general manager and superintendent of the defendant, Crystal Copper Company with full power, authority, charge, control, superintendency and management of said mine for said company, and with full power and authority from said company to sublease and grant to miners all the ores in any part or portion of said mine with the right in such miners to the exclusive possession and exclusive right to work such parts or portions of said mine, as they were granted by said defendant.

5.

That the plaintiffs, Lawrence Monzetti, Pete Gaido, Batt Tamietti, John Pagleero and Frank Tamietti are, and at all times herein mentioned were mining copartners in mine subleasing from said defendant.

6.

That on or about the 26th day of June, 1921, the above-named plaintiffs as aforesaid entered into an oral lease with the defendant for a certain portion of said Goldsmith Mine, to wit: 50 feet downward in said winze along the said North Lead from and under the 500 foot level of said mine approximately 1000 feet in a northwesterly direction from said No. 1 shaft, and easterly along the said lead to the east boundry line of said mine, and westerly to the west boundry line of said mine. [13]

7.

That the terms and conditions of said sublease were and are as follows, to wit: The plaintiffs were to enter in and upon said property and commence work and to continue to work in said winze and sink the said winze to a depth of about 50 feet and search for marketable ores; that in consideration of the work to be performed by the said plaintiffs the said defendant granted the said plaintiffs the exclusive right of possession of said winze and any drifts, cross-cuts and stopes from said winze the said plaintiffs would make in the above-described portion of said mine, and granted the said plaintiffs all the commercial ores they would discover in said winze to the depth of 50 feet and all

commercial ore discovered in any and all drifts, cross-cuts and stopes from said winze to the depth of 50 feet within the boundry lines of said mine and up to the 500 foot level of said mine, with the exclusive right to mine and remove any and all ores discovered by the said plaintiffs from said winze and any drifts, cross-cuts and stopes the said plaintiffs would make, in the above-described portion of said mine, and the said defendant was to furnish all explosives, all tools and timber needed, without charge to the plaintiffs outside of the royalties hereinafter mentioned, and to hoist and lower plaintiffs and their servants whenever necessary and to hoist all waste and ore which the plaintiffs delivered to the shaft on said 500 foot level in said mine in full carloads from said winze, drifts, cross-cuts and stopes without charge to plaintiffs outside of the royalties hereinafter mentioned; that on all ores shipped by the said lessees under said sublease the following deductions were to be made, to wit, freight charges on all the ores shipped to the smelter, and on all ores assaying up to \$25.00 per ton, 11½% royalty; from \$25.00 to \$50.00 per ton, 23% royalty; from \$50.00 to \$100.00 per ton, 34½% royalty; [14] from \$100.00 to \$200.00 per ton, 46% royalty; from \$200.00 and up per ton, 57½% royalty to the owners of the Goldsmith Mine, and 50% of the net balance was to go to the plaintiffs and 50% to defendant.

8.

That plaintiffs, Lawrence Monzetti, Pete Gaido, Batt Tamietti and John Paglero, duly entered in

and upon said mine on or about the 26th day of June, 1921, commenced sinking the said winze and continued to sink the said winze upon the terms and conditions aforesaid, pumping all water, doing all work that was necessary, including timbering and mining, until they had sunk said winze to a depth of about 50 feet.

9.

That the said defendant then and there on or about the 20th day of July, 1921, and after plaintiffs had discovered a vein of commercial ore in said lead running in an easterly and westerly course, orally agreed with the said plaintiffs to grant, and did grant, an extension of territory to the said plaintiffs to be mined by them in consideration that the said plaintiffs sink the said winze to a deeper depth, and they, said plaintiffs, were to have the exclusive right to all ores they discovered between the bottom of the said winze, when sunk to a deeper depth, up to the 500 foot level and within the boundary lines of said mine upon the same terms, conditions and royalties as aforesaid, and exclusive possession of said portion of said mine.

10.

That at all times hereinbefore mentioned, plaintiff, Frank Tamietti, had been sick and ill and unable to work in or upon said lease, all of which the said defendant had had notice of and had consented to the absence of the said plaintiff, Frank Tamietti; that on or about the 20th day of July, 1921, [15] after having recovered from said ill-

ness, with the consent of the defendant the said plaintiff, Frank Tamietti, commenced working in and upon said lease with plaintiffs, Lawrence Monzetti, Pete Gaido, Batt Tamietti and John Pagleero, as copartners with said plaintiffs.

11.

That the said plaintiffs pursuant to the aforesaid sublease and extension thereto, then and there on or about the 20th day of July, 1921, commenced sinking the said winze to a deeper depth than 50 feet, until they had reached the depth of about 75 feet and had struck a fault in said lead; that the said plaintiffs and lessees sank a sump in said winze about 6 feet deep and then commenced drifting east and west from said winze upon said vein of ore in said lead, and drifted for a distance of about 100 feet east, until they had come to a point where the ore in said vein ceased to be commercial in value; that the said plaintiffs and lessees then returned to the winze and commenced stoping and breaking ore and stoped up about 20 feet from the bottom of said winze and about 20 feet east from said winze; that then and there at the request of said defendant and under an oral agreement with the said defendant, the said plaintiffs were granted an extension of said lease by said defendant, wherein and whereby the said plaintiffs and lessees were to have, in addition to the territory already granted them, the exclusive right to mine all ores they would discover by cross-cutting north into the footwall of said lead, between the boundary lines of said mine and the bottom of said winze

and the 500 foot level of said mine, and exclusive possession of the same upon the aforesaid terms, conditions and royalties; that said plaintiffs commenced cross-cutting from the bottom of said drift north into the footwall of said lead and cross-cutted about 15 feet [16] into another vein in said lead and struck rich and valuable ore which assayed and assays on the average of about 37 ounces of silver per ton and about \$7.00 in gold per ton; that the ore in the first vein mentioned herein assayed and assays on the average of about 70 ounces of silver per ton and about \$11.00 in gold per ton; that the vein in the footwall of said lead is on the average of about 3 feet wide, and that the vein in the hanging-wall of said lead is on the average of about 3 feet wide.

12.

That in accordance with the above terms, conditions and royalties, said plaintiffs and lessees shipped 10 cars of ore from said lease to the smelter on and between the 10th day of August, 1921, and the 3d day of March, 1922; that on or about the 31st day of December, 1921, the plaintiffs and defendant had made full settlement on the first eight cars of ore shipped to the smelter, and that defendant thereby ratified the terms and conditions of said sublease and extensions thereof; that on or about the 31st day of January, 1922, the defendant received smelter returns and settlement from the smelter upon the ninth car that was shipped to the smelter by plaintiffs from said lease, and that on or about the 3d day of March, 1922, the defendant

received smelter returns and settlement from smelter on the 10th car that was shipped by plaintiffs from said lease; that \$122.86 on the said last two cars of ore shipped by plaintiffs from said lease to the smelter was withheld by defendant from said plaintiffs, that \$100.00 of said sum was withheld to pay for 400 shares of stock in the defendant corporation, that plaintiffs had heretofore purchased from defendant; that defendant failed, neglected and refused and ever since the 3d day of March, 1922, has failed, neglected and refused to deliver to [17] plaintiffs the said 400 shares of stock heretofore paid for, and that there is a balance of twenty-two and 86/100 (\$22.86) dollars due, owing and unpaid the plaintiffs by the said defendant upon said ninth and tenth cars of ore shipped by plaintiffs to the smelter from said lease.

13.

That on or about the 19th day of October, 1921, while the said plaintiffs were working in and upon the said lease, the said plaintiffs entered into a contract with the defendant, at the said defendant's special instance and request, to purchase 5,000 shares of stock in the defendant corporation from the said defendant at the agreed price of 25¢ per share net, and that the said stock was to be paid for by said plaintiffs as follows, to wit: \$25.00 was to be taken from the net returns of each of said plaintiffs share on each and every railroad car, of about 50 tons each, shipped by the said plaintiffs from said lease and sold to the smelter on and after said date.

14.

That thereafter the said plaintiffs shipped a railroad car of about 50 tons on the 27th day of October, 1921, and \$25.00 from each of said lessees was deducted from their share in the returns of each railroad car of ore so shipped, and the said money deducted was credited upon the said 5,000 shares of stock, and that \$25.00 from each of said plaintiffs was deducted from each and every railroad car thereafter shipped by said plaintiffs and sold to the smelter.

15.

That on or about the 3d day of January, 1922, the said plaintiffs had paid for 2,500 shares of stock by the deductions made on each railroad car so shipped as aforesaid, [18] and that the said defendant delivered 500 shares of stock to each of the said plaintiffs or 2,500 shares of stock, and thereby ratified said agreement to sell stock to said plaintiffs as aforesaid.

16.

That thereafter on or about the 31st day of January, 1922, the sixth railroad car of ore of about 50 tons, after entering into said contract to purchase stock was loaded by the said plaintiffs and shipped to the smelter and sold, and that \$25.00 was deducted from the net returns of each of said plaintiffs to pay on said contract for said stock.

17.

That thereafter on or about the 3d day of March, 1922, the said plaintiffs shipped the seventh railroad carload of ore, after entering into said con-

tract to purchase stock, from said lease of about 25 tons to the smelter and sold the said ore, and that the sum of \$25.00 was taken from the net returns of each of said plaintiffs on said railroad car to pay on said contract for said stock.

18.

That the plaintiffs, Lawrence Monzetti, Pete Gaido, Batt Tamietti and John Pagleero worked continuously under the said sublease and the said extension thereto from the 26th day of June, 1921, until the 16th day of January, 1922, and that plaintiff, Frank Tamietti worked continuously under the said sublease and the said extensions thereto from on or about the 20th day of July, 1921, until the 16th day of January, 1922; that the defendant then and there on or about the 16th day of January, 1922, arbitrarily ejected plaintiffs, Lawrence Monzetti, Pete Gaido and Batt Tamietti without cause, from said property, and arbitrarily refused to permit the said plaintiffs to go on with the said sublease, without cause, and arbitrarily refused to permit the said plaintiffs, Lawrence Monzetti, Pete [19] Gaido and Batt Tamietti, to enter into said mine or upon said property for the purpose of breaking ore and hoisting ore to finish their contract of paying for the stock the plaintiffs had purchased, without cause, or to enter in or upon the said property, and arbitrarily cancelled and rescinded the said sublease, without cause, and that defendant arbitrarily refused to deliver 400 shares of stock heretofore paid defendant by plaintiffs by deductions of \$25.00 from each of said plaintiffs share

from each of the said last 2 railroad cars of ore shipped, without cause; and that defendant ever since the said last 2 railroad cars of ore have been shipped as aforesaid, have arbitrarily refused to deliver the said 400 shares of stock to plaintiffs heretofore paid for by plaintiffs as aforesaid, without cause.

19.

That there were about 1,000 tons of ore averaging 70 ounces of silver per ton and \$11.00 per ton in gold or of the value of \$81.00 per ton in the vein of ore on the hanging-wall side of said lead, between the bottom of said winze and the 500 foot level of said mine, and the east and west line of said mine yet to be mined on said date that could and would have been mined by said plaintiffs within 30 days from and after the said 16th day of January, 1922, if, the said defendant had not interfered with the said plaintiffs and arbitrarily cancelled and rescinded the said sublease, without cause, that the said plaintiffs were and are entitled to under said sublease, to mine and ship to the smelter under the terms, conditions and royalties of the aforesaid sublease, and that these plaintiffs would have realized on said ore a net profit to themselves of Sixteen and 67/100 (\$16.67) Dollars per ton; and that there were approximately One Thousand (1,000) tons of ore to be mined in the footwall of said lead between the bottom of said winze and the 500 foot level of said mine and the east and west lines of said mine which could and would have been mined by said [20] plaintiffs

within a period of *ninth* days from and after the 16th day of January, 1922, if the said defendant had not interfered with said plaintiffs and arbitrarily cancelled and rescinded the said sublease, without cause, as aforesaid; that said plaintiffs were and are entitled under said sublease to mine and ship to the smelter under the terms, conditions and royalties of the aforesaid sublease, which would have averaged about 37 ounces of silver per ton and about \$7.00 in gold per ton, or of the value of \$42.00 per ton for said ore, which said lessees could have mined at a net profit of Twelve and 50/100 (\$12.50) Dollars per ton to said plaintiffs under the terms and conditions of said sublease, and said defendant arbitrarily refused to permit plaintiffs to go on with the aforesaid contract to purchase said stock as aforesaid, without cause.

20.

That the market value of said stock is now seventy cents per share; that since the cancellation and rescission of said lease and refusal of said defendant to permit plaintiffs to mine and ship the said ore necessary to finish buying said stock the said stock has reached the market value of \$2.00 per share, and that plaintiffs would have realized a net profit to themselves, if they had been permitted to mine and ship enough ore to pay for the balance of said stock, in the sum of \$1.75 per share.

21.

That by reason of the cancellation and rescission of the said lease, as aforesaid, the plaintiffs have been unable to ship the balance of the ore neces-

sary to finish the said contract of purchasing the said stock, to wit, 1,300 shares of stock, [21] which they would have realized a net profit of \$1.75 per share, or \$2,275.00.

22.

That by reason of the arbitrary cancellation and rescission of said lease by said defendant, without cause, and the arbitrary ejection of said plaintiffs from said property by the defendant, and the arbitrary refusal of the defendant to permit the plaintiffs to go on with said lease, and go on and complete said contract to purchase said stock or to enter in or upon the said property, without cause, and the arbitrary refusal of the said defendant to deliver the said 400 shares of stock to plaintiffs, that plaintiffs have heretofore paid for; that the plaintiffs have been damaged in the further sum of \$3,075.00 upon this their second cause of action, no part of which has been paid.

WHEREFORE, plaintiffs demand judgment on this their second cause of action against the defendant for the sum of \$3,075.00 as damages, together with costs of suit and for such other and further relief as to the Court may seem meet and just.

H. A. TYVAND and
F. E. McCRACKEN,
Attorneys for Plaintiffs.

(Duly verified.)

Filed November 28, 1923. C. R. Garlow, Clerk.

Thereafter, to wit, on the 18th day of August, 1924, an answer was filed herein, which said answer is in the words and figures as follows, to wit:
[22]

(Title of Court and Cause.)

ANSWER.

Comes now the defendant above named and for its answer to the amended complaint of the plaintiffs on file herein, admits, denies and alleges as follows:

First Count:

I.

Admits each and every allegation of the first paragraph thereof.

II.

Admits each and every allegation of the second paragraph thereof.

III.

Admits that this answering defendant was at the times mentioned in said amended complaint, engaged in mining ores at the said Goldsmith Mine, under a certain lease with the owners of said Goldsmith Mine, in the county of Silver Bow, and State of Montana; and, except as herein admitted, denies each and every allegation of the third paragraph thereof.

IV.

Admits that Matt W. Alderson was, at the times mentioned in said amended complaint, the general manager and superintendent of this answering de-

fendant; and, save as herein above admitted, denies each and every allegation in said fourth paragraph contained.

V.

This defendant denies each and every allegation of the fifth paragraph thereof.

VI.

This defendant denies each and every allegation of the sixth paragraph thereof. [23]

VII.

This defendant denies each and every allegation of the seventh paragraph of said first count, and, in this connection, alleges:

That said pretended contract was and is void under and by virtue of the provisions of paragraphs 1 to 5 of Section 7519, Section 7593 and Section 7939 of the Revised Codes of Montana of 1921.

VIII.

This defendant admits that the plaintiffs entered in and upon said mine on or about the 26th day of June, 1921, and performed some work therein, and thereon, and extracted some ores therefrom; and, except as herein above admitted, denies each and every allegation of the *eight* paragraph thereof.

IX.

This defendant denies each and every allegation of the ninth paragraph of said first count, and, in this connection alleges:

That the pretended contract therein set forth was and is void under the provisions of paragraphs 1 to 5 of Section 7519, Section 7593, and Section 7939, of the Revised Codes of Montana, of 1921.

X.

This defendant denies each and every allegation of the tenth paragraph thereof.

XI.

This defendant admits that at the times set forth in the eleventh paragraph the plaintiffs, or some of them, performed some work in and upon said mine, and extracted some ores therefrom; and, except as hereinabove admitted, denies each and every allegation in said eleventh paragraph contained. [24]

XII.

This defendant admits that some ores were shipped from said mine, which had been mined by the plaintiffs, or some of them, and in this connection this defendant alleges that the plaintiffs were fully paid for all work, labor and services performed by them or any of them, and, except as hereinabove admitted, this defendant denies each and every allegation of the twelfth paragraph thereof.

XIII.

This defendant denies each and every allegation of the thirteenth paragraph of said first count in said amended complaint contained.

XIV.

This defendant denies each and every allegation of the fourteenth paragraph of said first count.

XV.

This defendant denies each and every allegation of the fifteenth paragraph of said first count.

XVI.

This defendant denies generally each and every allegation in said first count contained, not hereinbefore specifically admitted or denied.

Second Count.

I.

Admits each and every allegation of the first paragraph thereof.

II.

Admits each and every allegation of the second paragraph thereof.

III.

Admits that this answering defendant was at the times mentioned in said amended complaint, engaged in mining ores at the said Goldsmith Mine, in the County of Silver Bow, and State of Montana; and, except as herein admitted, denies each and every [25] allegation of the third paragraph thereof.

IV.

Admits that Matt W. Alderson was, at the times mentioned in said amended complaint, the general manager and superintendent of this answering defendant; and, save as hereinabove admitted, denies each and every allegation in said fourth paragraph contained.

V.

This defendant denies each and every allegation of the fifth paragraph thereof.

VI.

This defendant denies each and every allegation of the sixth paragraph thereof.

VII.

This defendant denies each and every allegation of the seventh paragraph of said second count, and, in this connection, alleges:

That said pretended contract was and is void under and by virtue of the provisions of paragraphs 1 to 5 of Section 7519, Section 7593 and Section 7939 of the Revised Codes of Montana of 1921.

VIII.

This defendant admits that the plaintiffs entered in and upon said mine, on or about the 26th day of June, 1921, and performed some work therein, and thereon, and extracted some ores therefrom; and, except as herein above admitted, denies each and every allegation of the *eight* paragraph thereof.

IX.

This defendant denies each and every allegation of the ninth paragraph of said second count, and, in this connection alleges:

That the pretended contract therein set forth was and is void under the provisions of paragraphs 1 to 5 of Section 7519, Section 7593, and Section 7939 of the Revised Codes of Montana, [26] of 1921.

X.

This defendant denies each and every allegation of the tenth paragraph thereof.

XI.

This defendant admits that at the times set forth in the eleventh paragraph, the plaintiffs, or some of them, performed some work in and upon said mine, and extracted some ores therefrom; and, except as hereinabove admitted, denies each and every allegation in said paragraph contained.

XII.

This defendant admits that some ores were

shipped from said mine, which had been mined by the plaintiffs, or some of them, and in this connection alleges that the plaintiffs were fully paid for all work, labor and services performed by them, or either of them, and, except as hereinabove admitted, this defendant denies each and every allegation of the twelfth paragraph thereof.

XIII.

This defendant denies each and every allegation of the thirteenth paragraph of said second count in said amended complaint contained.

XIV.

This defendant denies each and every allegation of the fourteenth paragraph of said second count.

XV.

This defendant denies each and every allegation of the fifteenth paragraph of said second count.

XVI.

This defendant denies each and every allegation of the sixteenth paragraph of said second count.

XVII.

This defendant denies each and every allegation of the seventeenth paragraph of said second count.
[27]

XVIII.

This defendant denies each and every allegation of the eighteenth paragraph of said second count.

XIX.

This defendant denies each and every allegation of the nineteenth paragraph of said second count.

XX.

This defendant denies each and every allegation of the twentieth paragraph of said second count.

XXI.

This defendant denies each and every allegation of the twenty-first paragraph of said second count.

XXII.

This defendant denies each and every allegation of the twenty-second paragraph of said second count.

XXIII.

This defendant denies generally, each and every allegation in said second count contained, not hereinbefore specifically admitted or denied.

XXIV.

This defendant further alleges that there is a defect and misjoinder of parties plaintiff in this action, in that the said John Pagleero and Frank Tamietti, two of the plaintiffs above named, are not now and were not at any time mentioned in said complaint members of any copartnership with Lawrence Monzetti, Pete Gaido and Batt Tamietti or any of them.

WHEREFORE, this defendant having fully answered prays to be hence dismissed with costs.

WALKER & WALKER,

C. S. WAGNER,

Attorneys for Defendant.

(Duly verified.)

Filed Aug. 18, 1924. C. R. Garlow, Clerk. [28]

Thereafter, on Sept. 6, 1924, reply was filed as follows:

(Title of Court and Cause.)

REPLY.

Come now the plaintiffs above named, and for their reply to the answer of the defendant on file herein, deny as follows:

First Count.

1.

Deny each and every allegation contained in the 7th paragraph of the said answer to the first count.

2.

Deny each and every allegation contained in the 9th paragraph of the said answer to the first count.

3.

Deny each and every allegation contained in paragraph 12 of the said answer to the first count.

4.

Deny generally each and every allegation contained in said answer to the first count not hereinbefore specifically admitted or denied.

Come now the plaintiffs above named, and for their reply to the answer of the said defendant on file herein, deny as follows:

Second Count.

1.

Deny each and every allegation contained in

the 7th paragraph of the said answer to the second count.

2.

Deny each and every allegation contained in the 9th [29] paragraph of the said answer to the second count.

3.

Deny each and every allegation contained in paragraph 12 of the said answer to the second count.

4.

Deny each and every allegation contained in paragraph 24 of the said answer to the second count.

5.

Deny generally each and every allegation contained in said answer to the second count not hereinbefore specifically admitted, or denied.

WHEREFORE, plaintiffs repeat the prayer of their complaint herein.

H. A. TYVAND,

F. E. McCRACKEN,

Attorneys for Plaintiffs.

(Duly verified.)

Filed Sept. 6th, 1924. C. R. Garlow, Clerk.

Thereafter, on December 3d, 4th and 5th, 1924, said cause was tried, and the record of said trial is in the words and figures as follows, to wit: [30]

(Title of Court and Cause.)

TRIAL.

3d day of December, 1924.

This cause came on regularly for trial this day, H. A. Tyvand, Esq., and F. E. McCracken, Esq., appearing for the plaintiffs and T. J. Walker, Esq., and C. S. Wagner, Esq., appearing for defendant. Thereupon the following were duly impaneled, accepted and sworn as a jury, to try the cause, viz.: Frank E. Brown, W. A. Triplett, Lewis Christensen, M. V. Conroy, Olive Penny, James Job, Thomas Tracy, Gus Meyer, John Jahreiss, T. C. Truscott, Frank S. Sadler, and Thomas Rodgers.

Thereupon Batt Tamietti was sworn as a witness for plaintiffs, whereupon defendant objected to any testimony relating to the causes of action set forth in the amended complaint, for the reason they do not state facts sufficient to constitute a cause of action, which objection was overruled, and the exception of defendant noted. Thereupon examination of the witness, Batt Tamietti, was proceeded with, whereupon defendant objected to any testimony relating to any conversations or agreement had with one Matt W. Alderson, former general manager of the defendant company and now deceased, and for the further reason that the plain-

tiffs are suing as mining copartners and it is not shown that they owned or acquired, according to the statute, the mining claim in question. Thereupon the objections were argued and submitted, and by the Court taken under advisement. Thereupon Court ordered that trial of cause proceed and the Court would later render its decision on defendant's objections. Thereupon further examination of the witness Tamietti was proceeded [31] with, and W. W. Pennington and Lawrence Monzetti were sworn and examined as witnesses for the plaintiffs, and certain documentary evidence, viz.: Plaintiffs' Exhibits "A," "B," "C," "D," "E," "G," "H," and "I" introduced, whereupon further trial was ordered continued until 10 A. M. to-morrow and the jury excused until such time.

Entered in open court December 3d, 1924.

C. R. GARLOW,
Clerk. [32]

(Title of Court and Cause.)

TRIAL (CONTINUED).

December 4, 1924.

Counsel for respective parties with the jury present as before, and trial of cause resumed. Thereupon Lawrence Monzetti was recalled and W. R. Richards, Pete Gaido, Harrison E. Clement and Frank Tamietti were sworn and examined as witnesses for the plaintiffs, and Plaintiffs' Exhibits "O," "Q" and "R" introduced in evidence,

exhibit "S" for plaintiffs not being admitted on objection, whereupon plaintiffs rested. Thereupon Joe Flaherty and John Pagleero were sworn and examined as witnesses for defendant and Frank Tamietti was recalled by defendant and Defendant's Exhibits "J," "K," "L," "M," "N" and "P," and a certain offer in tender introduced in evidence, whereupon defendant rested.

Thereupon Lawrence Monzetti was recalled for further examination, and Batt Tamietti was recalled and testified in rebuttal, whereupon the evidence closed. Thereupon defendant moved the Court to direct the jury to return a verdict herein in favor of the defendant and against the plaintiffs Gaido, Frank Tamietti and Pagleero, for the reason that the evidence shows that said plaintiffs have no interest in this litigation, but have settled with the defendant company, and that the Court direct the jury to return a verdict in favor of the defendant and against all of the plaintiffs herein on the ground that there is a fatal variance between the allegations and the proofs and for other reasons stated. Thereupon said motions were argued by counsel and submitted and by the Court taken under advisement.

Entered in open court December 4th, 1924.

C. R. GARLOW,
Clerk. [33]

TRIAL (CONTINUED).

December 5, 1924.

(Title of Court and Cause.)

Counsel for respective parties, with the jury present as before, and trial of cause resumed. Thereupon Court ordered that defendant's motion for a directed verdict made herein on yesterday be granted as to the second count to amended complaint, and denied as to the first count of said amended complaint, and the jury was thereupon instructed to return a verdict in favor of the defendant and against the plaintiffs as to the second count of the amended complaint. Thereupon after the arguments of counsel and the instructions of the Court, the jury retired to consider of its verdict. Thereupon the defendant excepted to the Court's refusal to give the requested instructions, and to certain of the instructions given by the Court, exception duly noted. Thereafter, the jury returned into court with its verdict, F. E. McCracken, Esq., being present as attorney for the plaintiffs, and C. S. Wagner, Esq., being present as attorney for defendant, which verdict was received by the Court and ordered filed and read, and by the jury acknowledged to be its true verdict, being as follows, to wit:

“We the jury in the above-entitled court and action find our verdict in favor of the plaintiffs Batt Tamietti and Pete Gaido, and against the defendant and assess plaintiffs' damages in the sum of Seven Hundred Seventy and 66/100 (\$770.66) Dollars each.

M. V. CONROY,
Foreman.”

Thereupon Court ordered judgment entered accordingly.

Entered in open court December 5th, 1924.

C. R. GARLOW,
Clerk.

Thereafter, on December 5th, 1924, a verdict was duly rendered and filed herein, which verdict is in the words and figures as follows, to wit: [34]

(Title of Court and Cause.)

VERDICT.

We, the jury in the above-entitled court and action, find our verdict in favor of the plaintiffs Batt Tamietti and Pete Gaido, and against the defendant, and assess plaintiffs' damages in the sum of Seven Hundred Seventy and 66/100 (\$770.66) Dollars each.

M. V. CONROY,
Foreman.

Filed December 5, 1924. C. R. Garlow, Clerk.

Thereafter, on December 6th, 1924, an order extending time to file and serve bill of exceptions was duly made and entered herein, which order is in the words and figures as follows, to wit: [35]

(Title of Court and Cause.)

ORDER EXTENDING TIME TO FILE BILL
OF EXCEPTIONS THIRTY DAYS.

Saturday, December 6, 1924.

On motion of T. J. Walker, Esq., attorney for defendant herein, Court ordered that defendant be granted thirty (30) days in addition to the time allowed by rule within which to serve and file bill of exceptions.

Entered in open court December 6th, 1924.

C. R. GARLOW,
Clerk.

Thereafter, on the 6th day of December, 1924, a judgment was duly entered herein, which judgment is in the words and figures as follows, to wit: [36]

(Title of Court and Cause.)

JUDGMENT.

BE IT REMEMBERED, that this cause came regularly on for trial on Wednesday the 3d day of December, 1924, the plaintiffs were represented by Messrs. H. A. Tyvand and F. E. McCracken. The defendant was represented by Messrs. Walker and Walker and C. S. Wagner. The same came on before the Honorable Charles N. Pray, Judge presiding. A jury of twelve men were duly impaneled and sworn to try the case. Evidence was introduced on behalf of the plaintiffs and on behalf of the defendant. The amended complaint contained

two causes of action; as to the second cause of action, the Court directed the jury to return a verdict in favor of the defendant after all the evidence had been introduced. After argument of counsel, the Court instructed the jury as to the law, and the jury retired in custody of a sworn bailiff to consider of their verdict, which after title of court and cause is as follows, to wit:

“We, the jury in the above-entitled court and action find our verdict in favor of the plaintiffs Batt Tamietti and Pete Gaido, and against the defendant, and assess plaintiffs’ damages in the sum of Seven Hundred Seventy and 66/100 (\$770.66) Dollars each.

M. V. CONROY,
Foreman.”

WHEREFORE, by reason of the law and the premises, IT IS ORDERED, ADJUDGED and DECREED, and this does ORDER, ADJUDGE and DECREE, that plaintiff, Batt Tamietti, do have and recover of the defendant Crystal Copper Company, a corporation, the sum of Seven Hundred Seventy and 66/100 (\$770.66) Dollars, that plaintiff Pete Gaido do have and recover of the defendant, Crystal Copper Company, a corporation, the sum of Seven Hundred Seventy and 66/100 (\$770.66) Dollars, that said plaintiffs have and recover of said defendant costs of suit taxed in the sum of Twenty-one and 70/100 Dollars.

Dated this 6th day of December, 1924.

CHARLES N. PRAY,
Judge.

Entered December 6, 1924. C. R. Garlow, Clerk.
[37]

Thereafter, on the 20th day of January, 1925, a bill of exceptions, duly settled and allowed, was filed herein, which bill of exceptions is in the words and figures as follows, to wit: [38]

In the District Court of the United States in and
for the District of Montana.

No. 362.

LAWRENCE MONZETTI, PETE GAIDO,
BATT TAMIETTI, JOHN PAGLEERO,
and FRANK TAMIETTI,

Plaintiffs,

vs.

CRYSTAL COPPER COMPANY, a Corporation,
Defendant.

PROPOSED AMENDMENTS TO BILL OF
EXCEPTIONS.

To the Defendant Above Named, Crystal Copper
Company, and Walker & Walker and C. S.
Wagner, Esqs., Its Attorneys:

You and each of you will please take notice that the following amendments are proposed on the part of the plaintiffs to the bill of exceptions proposed by the defendant, to wit:

FIRST: On page entitled "Pliffs. Case—55," after line 11, insert the following:

“Mr. McCracken.—Plaintiffs object to the introduction of exhibit ‘J,’ upon the grounds and for the reasons that the same is irrelevant and immaterial and not within the issues of this case, furthermore the same does not prove or tend to prove any of the issues of this case.

The COURT.—The objection is overruled.

Exception.

Mr. McCracken.—Plaintiffs object to the introduction of exhibit ‘K,’ upon the grounds and for the reasons that the same is irrelevant and immaterial and not within the issues of this case, furthermore the same does not prove or tend to prove any of the issues of this case, also it fails to show any consideration for any pretended release as to the 300 shares of stock claimed by Monzetti, as he received nothing more than that which he had coming at that time. [39]

The COURT.—The objection is overruled.

Exception.

Mr. McCracken.—Let the record show that plaintiffs make the same objection to exhibit ‘L’ as plaintiffs made to exhibits ‘J’ and ‘K.’

The COURT.—Let the record so show and that the objection is overruled.

Exception.”

Mr. McCracken.—Plaintiffs make the same objection to exhibit ‘M’ as made to exhibits ‘J,’ ‘K’ and ‘L.’

The COURT.—Let the record show the same objection and that the objection is overruled.

Exceptions.”

Mr. McCracken.—Plaintiffs object to the introduction of exhibit ‘N,’ upon the grounds and for the reasons that the same is irrelevant and immaterial and not within the issues of this case, furthermore the same does not prove or tend to prove any of the issues of this case, also it fails to show any consideration for any pretended release by Monzetti, as he received nothing more than that which he had coming at that time.

The COURT.—The objection is overruled.
Exception.”

SECOND: On page entitled “Def’ts. Case—106,” after line 17, insert the following:

“Mr. McCracken.—If the Court please, plaintiffs move the Court to strike from the evidence Defendant’s Exhibit ‘J,’ upon the grounds and for the reasons that the same is irrelevant and immaterial, that no consideration has been shown for the same, as Monzetti received nothing more than that which he had coming at that time, furthermore the signature was obtained at a time Monzetti was incompetent to act and did not know what he was doing, furthermore he was unable to read or write, also it does not prove or tend to prove any of the issues in this case as no release was plead in the answer. [40]

The COURT.—The motion will be denied.
Exception.

Mr. McCracken.—Plaintiffs make the same motion as to Defendant’s Exhibit ‘K,’ as was made to exhibit ‘J.’

The COURT.—Let the record show the same

motion as to Defendant's Exhibit 'K' and that the motion is denied.

Exception.

Mr. McCRACKEN.—Plaintiffs make the same motion as to Defendant's Exhibit 'L' as was made to exhibits 'J' and 'K.'

The COURT.—Let the record show the same motion as to Defendant's Exhibit 'L' and that the motion is denied.

Exception.

Mr. McCRACKEN.—Plaintiffs make the same motion as to Defendant's Exhibit 'M' as was made to exhibits 'J,' 'K' and 'L.'

The COURT.—Let the record show the same motion as to Defendant's Exhibit 'M' and that the motion is denied.

Exception.

Mr. McCRACKEN.—Plaintiffs make the same motion as to Defendant's Exhibit 'N' as was made to exhibits 'J,' 'K,' 'L' and 'M.'

The COURT.—Let the record show the same motion as to Defendant's Exhibit 'N' and that the motion is denied.

Exception."

The foregoing proposed amendments are offered and proposed upon the grounds and for the reasons that the said objection and motions were made at the trial of said cause and are not included in the proposed bill of exceptions and that exceptions

were noted by the plaintiffs to the rulings of the Court.

H. A. TYVAND and
F. E. McCRACKEN,
Attorneys for Plaintiffs.

Service of the foregoing proposed amendments to bill of exceptions and copy received this 8th day of January, 1925, and may be allowed by the Court or Judge.

WALKER & WALKER,
C. S. WAGNER,
Attorneys for Defendant.

Filed Jan. 8, 1925. C. R. Garlow, Clerk. [41]

In the District Court of the United States in and
for the District of Montana.

LAWRENCE MONZETTI, PETE GAIDO,
BATT TAMIETTI, JOHN PAGLEERO
and FRANK TAMIETTI,
Plaintiffs,

vs.

CRYSTAL COPPER COMPANY, a Corporation,
Defendant.

BILL OF EXCEPTIONS.

BE IT REMEMBERED that in the above-entitled case, Lawrence Monzetti, Pete Gaido, Batt Tamietti, John Pagleero and Frank Tamietti, plaintiffs, brought their suit against Crystal Copper Company, a corporation, defendant; that the cause

(Testimony of Batt Tamietti.)

came on for trial before Hon. Charles N. Pray, the Judge presiding, sitting with a jury, on the 23d day of November, 1924, in the Federal courtroom in the city of Butte, Silver Bow County, Montana. Whereupon the following proceedings were had and done, testimony taken, the rulings of the Court hereinafter set forth were made, and the exceptions of the parties thereto noted:

Present: H. A. TYVAND, Esq., Attorney for the Plaintiffs.

F. E. McCRACKEN, Esq., Attorney for Plaintiffs.

THOMAS J. WALKER, Esq., Attorney for Defendant.

CHARLES S. WAGNER, Esq., Attorney for Defendant. [42]

TESTIMONY OF BATT TAMIETTI, FOR PLAINTIFFS.

BATT TAMIETTI, one of the plaintiffs, called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination by Mr. McCRACKEN.

Q. State your name, please.

Mr. WAGNER.—At this time, if the Court please, we object to the cause of action set forth in the complaint, in the first cause of action, on the ground and for the reason that it does not state facts sufficient to constitute a cause of action. We make the same objection to the cause of action set forth in part 2 of the complaint, that it does not

(Testimony of Batt Tamietti.)

state facts sufficient to constitute a cause of action. This is merely submitted for the purpose of saving the record.

The COURT.—That matter, I suppose, has been threshed out heretofore on demurrer.

Mr. TYVAND.—Yes, and on the former trial also it was argued.

The COURT.—Very well, the Court will overrule the objection.

Mr. WAGNER.—Note an exception.

A. Batt Tamietti.

The WITNESS.— I am one of the plaintiffs in this action, and reside at 320 West Daly Street, Walkerville. I am a miner by occupation, and have worked in the mines for about 26 years, which time has been spent here in Butte. I worked for a little while outside of Butte, not more than six months or a year, in British Columbia. I am acquainted with the Goldsmith mine, north of Walkerville, in Silver Bow County, Montana, and was acquainted with Matt W. Alderson during his lifetime. At the time I was acquainted with Mr. Alderson he was general manager of the [43] Crystal Copper Company, the defendant in this action. I knew Mr. Alderson since the year 1920, and was acquainted with him on or about the 26th of June, 1921.

Q. Did you have any business transactions with Mr. Alderson as general manager of the Crystal Copper Company, on or about the 26th of June, 1921?

(Testimony of Batt Tamietti.)

Mr. WAGNER.—Wait a minute. We object, may it please the Court, on the ground and for the reason that it appears already from the testimony, at least from one of the questions propounded by counsel, that Matt W. Alderson is dead. He was the general manager of the company, and under the express provisions of subdivision 4 of Section 10535 of the Revised Codes of Montana of 1921, the plaintiffs would be incompetent to testify as to direct transactions or communications between themselves and the deceased agent of the corporation.

The paragraph which I refer to, may it please the Court, reads as follows: Subdivision 4. “The following witnesses are incompetent. Subdivision 4. “Parties or assignors of parties to an action or proceeding or persons in whose behalf an action or proceeding is prosecuted against any person or corporation, as to the facts of direct transaction or oral communications between the proposed witness and the deceased agent of such person or corporation, and between such proposed witness and any deceased officer of such corporation, except when it appears to the court that without the testimony of the witness injustice will be done.”

(Arguments.)

The COURT.—We will pass that for the time being and the Court will pass on that later. [44]

Mr. WAGNER.—We note an exception to the ruling of the Court.

A. Yes, sir.

(Testimony of Batt Tamietti.)

Q. What was that transaction?

Mr. WAGNER.—At this time, may it please the Court, we object on the ground and for the reason that the complaint in this case shows upon its face that the plaintiffs seek recovery upon an alleged oral lease entered into between themselves and the defendant corporation, through the instrumentality of an agent or general manager of the corporation, that therefore the complaint discloses that while the alleged contract is denominated as a lease, it is in law and under the allegations of the complaint a parol license to enter into and upon the Goldsmith mine, for the purpose of working the same, and being a license rather than a lease the complaint fails to state facts sufficient to warrant a recovery, in that recovery is sought upon the basis of a prospective privilege or profits to be earned in the future, whereas, under the license they are limited to recovery, if recovery may be had at all, for ores actually removed from the place and mined. In other words, their recovery is limited to a share of the proceeds of personal property after removed from the mine. Further, we object to the testimony because the plaintiffs in this action seek a recovery upon the proposition that they are a mining partnership, having sued as a mining partnership, and under the laws of the State of Montana, their holding being that of licensees, there is no allegation in the complaint that they own the Goldsmith mine or acquired an interest in the Goldsmith mine itself, such as is required to constitute

(Testimony of Batt Tamietti.)

a mining partnership, and having undertaken to recover as a mining copartnership, they may not recover in this action as individuals upon any theory. Further, we [45] object to any further testimony in this case, upon the ground that the complaint shows upon its face that the alleged contract was an oral contract, and is therefore void under the statute of frauds, particularly sections 7593, 7599, subdivision 5, section 7939, all of the Civil Code, and sections 10611 and 10613 of the Code of Civil Procedure, all being sections of the Revised Codes of Montana of 1921. And we object, further, that the complaint shows upon its face that the alleged contract sued upon, though oral, is so vague, indefinite and uncertain in its terms as to be void and not enforceable, and that it would require the Court to make a contract for the parties in order to recover on any theory of the case.

(Jury excused. Arguments.)

The COURT.—Is Matt W. Alderson the only person with whom the plaintiffs had any dealings whatsoever entering into this agreement?

Mr. WALKER.—I think so, your Honor.

Mr. TYVAND.—Yes, your Honor.

The COURT.—You have no other way whatsoever of proving the transaction with the Crystal Copper Company, with the exception of the transaction with Matt W. Alderson?

Mr. TYVAND.—No, that is the only way.

The COURT.—When did he die?

(Testimony of Batt Tamietti.)

Mr. WAGNER.—He died last summer,—1923, a few months after the last trial.

The COURT.—When was this suit brought?

Mr. TYVAND.—It was brought a year and a half ago. November 25th, 1922. [46]

The COURT.—It was brought while Mr. Alderson was alive?

Mr. TYVAND.—Yes, he was here at the former trial and testified.

The COURT.—What became of that case?

Mr. TYVAND.—It was a mistrial, because we didn't have some of the parties we should have had and the Court allowed us to bring the other parties in as plaintiffs, and Mr. Alderson was here as a witness at that time, and here on the stand.

The COURT.—He testified on the part of the plaintiff?

Mr. TYVAND.—We called him, yes.

The COURT.—And his testimony is preserved, I suppose?

Mr. TYVAND.—Yes, we have it here.

Mr. WAGNER.—But Mr. Alderson was not a witness for us. The case terminated on the conclusion of the plaintiff's case.

(Arguments.)

(Recess until 2 P. M.)

The COURT.—Well, go ahead and put in your proof, and between now and to-morrow morning we will probably be able to thresh out the proposition of law and if you have any points on the part of the plaintiff, get them together, and submit any-

(Testimony of Batt Tamietti.)

thing bearing on this, in addition to what you have stated and the cases you have referred to. The Court will endeavor in the meantime between now and to-morrow morning to go over the matter and arrive at some decision if possible. Meantime we will call in the jury and proceed with the case. [47]

Q. (Question read as follows: "What was that transaction?")

A. On the 26th day of June, 1921, I heard from Mr. Frank Tamietti that Mr. Alderson, the manager of the Crystal Copper Company, that he wanted to lease a portion of the Goldsmith mine in the north-west of the claim, and so as soon as we heard that we decided together and we went and sent Frank Tamietti to see after we were all there in the house, we agreed to go up and see Mr. Alderson about the terms and conditions of this lease. So the condition and the term of this lease, whatever it was, we were doing on our part was satisfactory; and the term and condition was to pay so much for royalty, and after we paid the royalty divide from the net profit, divide fifty-fifty, and the condition was to sink fifteen feet more in the winze there, that it was down 35 feet already, and then we had the right to extract all the ores there was there on both sides, east and west, and if we were doing some improvement work from that deep up, north from that deep fifteen feet up to the level; if we were doing some extra work, you know, cross-cutting north and south and find

(Testimony of Batt Tamietti.)

some ore maybe, and have the right to take it all out, too.

Mr. WAGNER.—Just a minute. In order to save the record and expedite proceedings, we move the answer be stricken and urge the same grounds urged in the objection to any future testimony the witness may give,—we will ask to save the record that way, the same objections may apply, motions to strike and the same ruling.

The COURT.—It is so understood, the objection goes to all this testimony.

Q. When you referred to your partners, who did you refer to? When you spoke of your partners, what people did you speak of? [48]

A. Mr. Alderson and Mr. Lawrence Monzetti, and Mr. Frank Tamietti, and Mr. Pete Gaido, and myself, Batt Tamietti, and John Pagleero.

Q. Was Mr. Alderson one of your partners?

A. No, all the rest were my partners.

Q. What level in the mine was this winze you were going to work in?

A. The 500 foot level, the No. 1 Goldsmith shaft.

Q. How far was that from the shaft?

A. Northwesterly about a thousand feet.

The WITNESS.—The royalties, we were to pay were on ore of a value of twenty-five dollars a ton, \$11.50; on ore of the value of from twenty-five to fifty dollars, we have to pay \$23.00, and from fifty to a hundred dollars, we have to pay \$34.00, and from \$100.00 to \$200.00 we have to pay \$50.00, and from two hundred up, we have to pay 56% royalty.

(Testimony of Batt Tamietti.)

This royalty was to be paid to the Clark bank. We used to pay all the expenses of shipment and treatment before paying the royalty, and then we paid according to the value of the ore, so much per cent, and then divided fifty-fifty on the net, divided fifty-fifty with the Crystal Copper Company. I and my partners were to have the other half. The ground or territory which we were to have, the lease, was to sink complete fifty feet in this winze, and then we would have the right to take all the ore there was east and west of that winze, and if we did some improvement work on the hanging and foot wall, would have the right to take it out too; have all the ore as far as it went. I spoke of fifty feet, and that was from the level, the 500 foot level. The winze was 35 feet deep before we started. The Crystal Copper [49] Company was to furnish the machinery, tools, supplies, powder, fuse, caps, timber, and everything, and we have to do the work. The company was to hoist the ore and the waste, from the level, the 500 foot level, but we were to run it out to the shaft. When we started to work there there was about 10 or 12 feet of water in the winze, and we had water all the time we sank.

Q. And did you accept the terms of the lease?

Mr. WAGNER.—We object to that as being leading and suggestive and calling for the conclusion of the witness.

The COURT.—The objection is overruled.

Mr. WAGNER.—Exception.

A. Yes, sir, we accepted it in that way.

(Testimony of Batt Tamietti.)

We started to work on the night of the 26th of June, at ten o'clock, started sinking in the winze; started to rustle a pump and connect this pump and then started to work pumping the water, and after we had the water out we started to clean out lots of dirt that was around the winze in the bottom, and then of course started to blast, and timber and do anything we needed. It was only waste at that time. We sank down to the depth of about 45 feet before we had ore, and discovered ore about that point, in the far corner of the east winze. We continued to sink until we had about fifty-one, fifty-one and a half or fifty-two feet and then the ore was going down and we had to sink more, and Mr. Alderson, he used to generally come down every day in the mine, and we were working there together, the five, except when we used to hoist all the ore and the waste; we had a little ore, to hoist on the level—we were not four there working; one hoisting the ore and the waste, and we asked permission of Mr. Alderson if we cannot sink more on this lead, and Mr. Alderson say "Sure," he said, "down in this winze," he [50] said, "until the ore is gone; the more you sink the more ore you are going to have up over your head; and you fellows going to make money and the company going to make money." So we keep on going and sinking until we were about 75 feet deep, and something come across from the west side, they call it a fault, and it cut all the ore out, so we agreed, our partners together, no more use to sink in here, there's no more ore and better notify Mr. Alderson

(Testimony of Batt Tamietti.)

that we intended to quit. All right. As soon as we went on top at noon-time we saw Mr. Alderson and notified him about it. Well, he would be down tomorrow, he said, and so all right. He come down the next day and he said, "All right, just sink in a sump enough to hold the water between one shift and another, and then," he say, "you can take out all the ore as quick as you can." So we start right away to sink a little bit of sump and then we went east and west extracting ore, the way the lead go, you see.

Four of us started to work in this winze on the night of the 26th, Mr. Lawrence Monzetti, Mr. Pete Gaido, and Mr. John Payleero, but our lease, when we went up to take this lease, was to be with five partners, but at that time Mr. Frank Tamietti was sick, but we were to take him in when he was able to work and accept him as a partner. He came to work there some time in July, the 15th or 20th, 1921, after we had struck the ore.

The terms of the extension were the same conditions as when we started to work there, exactly the same condition as to royalty and everything else, we were to follow the ore as far as it went. The ore in the bottom of the winze, in some places was fourteen feet wide. When we completed the sump we went east and west and we started to stope and he told us to send up all [51] the ore we can. This lead only went west about nine or ten feet, west of the winze. We drifted in about 100 feet east of the winze, all the way in the lead. The lead close to

(Testimony of Batt Tamietti.)

the winze was bigger than inside, but we averaged up that the lead was from four feet, three and a half, four feet, three feet, or an average of three and a half feet. We stoped above the winze and then we stoped about twenty feet east of the winze, in length about twenty feet in height. That was from the bottom of the drift. When we got about 100 feet east of the winze the ground we were in in this 100 feet we found something like a fault, you know, where the lead was kind of splitting in four or five branches, and we thought to leave it there for the present, as it would not pay to go ahead and work, but after that maybe we were intending to go, but not at the present. We used to timber close to the winze and put in poles and put in tracks and put in chutes and put in slides, when we were intending to take this ore out; we had three or four chutes in, and we had a slide, and there was nothing more to do, it was just ready to fall into the chutes. After we had completed this kind of work we had further transactions with the company in regard to more territory. We knew that there used to be another lead in the foot, and we agreed to take out a foot lead, first to take all the ore out from the hanging; if we take the lead from the hanging first, and then take the foot lead; it was dangerous, and we cannot hold the hanging any more; so we agreed to put in a cross-cut in the foot and go into the foot lead and we started to cross-cut in the foot lead until we had this other lead, and we find it, and it was two feet and a half to three feet wide.

(Testimony of Batt Tamietti.)

We drove that cross-cut about twenty feet. We agreed to drive [52] that in, between myself and Mr. John Pagleero, Mr. Frank Tamietti, Mr. Lawrence Monzetti and Mr. Pete Gaido, and the company was glad if we were going to find some ore, and that was all right, and say, "The more ore you find the better it is for the company and better for you fellows." Mr. Alderson, the manager of the company, told us that.

We took assays and samples. I just had time to go through this lead and then we took one sample in both sides of the face, and I gave them to Mr. Alderson, and Mr. Alderson carried it down to the assayers and I received it the day after. I took the samples of the ore on the hanging-wall side, the first ore we worked in; generally used to take one sample every day. This ore that seemed to split up on the east end of this drift cut up pretty near straight, about 80 degrees to the west, that is, using the bottom of the drift as the base. The ore ran from 9 to 10 feet west of the winze, and cut off there at about 65 degrees east, using the bottom, 55 degrees.

During the time we worked in this winze and drifting east and stoping, we shipped ore, shipped ten carloads, not quite fifty tons to the carload, and the ore was shipped in the name of the Crystal Copper Company. Plaintiff's proposed exhibit "A" which you show me I saw before; saw them every time we made a shipment. This came from the smelter, East Helena, and was shipped by the

(Testimony of Batt Tamietti.)

Goldsmith mine. The handwriting on the back of this is Mr. Alderson's, the manager of the Crystal Copper Company. We received the money that the back of these returns purports to have been paid us on those returns. This is for my share. [53]

Mr. McCracken.—We ask to introduce exhibit "A" in evidence.

Mr. Wagner.—We object, may it please the Court, for the reason that no sufficient foundation has been laid for their introduction for any purpose; there is no claim in this complaint that the plaintiffs were not paid for all ore that they shipped; we cannot see any relevancy at this time.

Mr. McCracken.—These are offered to be introduced for the purpose of showing the value of the ore to make an estimate of the value of the ore remaining in any place, and it furthermore shows ratification on the part of the company.

Mr. Walker.—We object on the further ground for the reason that it is not any evidence as to the measure of damage in this case, not competent or material for that purpose, nor any evidence of any ratification.

The Court.—The witness claims this to be part of the shipment of the ten cars?

Mr. McCracken.—Part of it; yes, sir.

The Court.—Well, for the present I will overrule the objection.

Mr. Wagner.—Exception.

(Papers received in evidence, marked "Plaintiffs' Exhibit "A," and are as follows:) [54]

PLAINTIFF'S EXHIBIT "A."

AMERICAN SMELTING AND REFINING CO.

East Helena Plant, East Helena, Mont.

Ore Settlement Sheet.

Mine—Goldsmith.	Shipping Point—Butte.
Bought of Crystal Copper Co.	Date—Oct. 4, 1921.
Assays Per Ton.	Percentage.
Gold .43 Ounces	for 95 Per Cent @ \$20.
Silver 52.7 Ounces	for 100 Per Cent @ .991 $\frac{1}{4}$
Lead Per Cent	for 90 Per Cent @
Copper Per Cent	“ 100% Dry (Wet Less 1.3 @
Insoluble	@
Iron Per Cent	@
Manganese Per Cent	@
Lime Per Cent	@
Zinc 3.2 Per Cent	Over Per Cent @ .30
Sulphur Per Cent	
Speiss Per Cent	

Serial Number	Our Number	Car Number	Gross Weight	a/c Moisture
2193	2255	58561	114460	2.8

Mine No.

24

Date of B/L.

Date of arrival, Sept. 28, 1921.

Quotations:

Silver .991 $\frac{1}{4}$

Lead —

Copper —.

AMERICAN SMELTING AND REFINING CO.

By M.

Keep this Statement.

Checked by W. [55]

Prices.	Debit	Credit
Gold—Per Ounce Less Treatment		8.17
Silver—Per Ounce 5% @ .991¼ per Oz.	2.62	52.30
Lead—Per Cwt. less cts. per lb.		
Copper—Per lb. less cts. per lb.		
Insoluble—Per Unit		
Iron—Per Unit		
Manganese—Per Unit		
Lime—Per Unit		
Zinc—Per Unit		.96
Sulphur and speiss treatment, per ton	11.00	
Totals	14.58	60.47
		45.89

Number of Sacks.	Net Weight	Per Ton	
	111255	45.89	2552.75
Weight of Sacks.			

Freight	132.77
War Tax	3.98

Additional freight on bullion to New York 90% of the lead @ \$6.35 per ton plus increase of \$6.15 per ton effective August, 1920.

Sampling		
Totals	136.75	2552.76

Net Proceeds	2416.00
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A charge of five dollars made for sampling on all lots of ore containing less than five tons. Rates subject to change without notice except on contracts for specified time or specified tonnage. [56]

Notations on back of foregoing exhibit:

Net proceeds	\$2416.00
23% royalty	555.68
	<hr/>
Returns from smelter.....	\$1860.32
Leasers—one-half	930.16
Ardeccion—Inders Accident	\$2.10
Bawden—Loading	6.50
Miller—Loading	6.50
Ardeccion, Labor, 21 days,	
\$99.75	98.75
	<hr/>
	\$113.85 Minus 113.85
Less hosp. dues	
To be divided	930.16—918.10=\$1734.41.

[57]

Butte, Montana, January 31, 1922.

East Butte Copper Mining Co.,

Pittsmont Smelter.

Ore received from Crystal Copper Company. Location, Goldsmith Mine.

Lot No. 8519. Mine No. 5. Date sampled, January 24, 1922.

Car No. 57962. Wet Weight, 88980. Moisture, 2.2. Dry Weight, 87022.

Assays: Elect Cu% .26; Ozs. Ag. 47.8; Ozs. Au. .36; % 510₂ 67.8; % FE. & Mn. 8.9; % Zn. 4.8.

Silver 2079.826 Ozs.; @ 90% 1871.843 Ozs.

@ 99.625\$1864.82

Gold 15.664 Ozs. @ 90% 14.098 Ozs. @

\$20.00 281.96

Gross Value\$2146.78

Deductions:

Treatment Charges 43.511 Dry Tons	
@ \$10.00 Gross value.....	435.11
Freight 44.49, Wet tons @ 62½.....	27.81
	<hr/>
	462.92
	<hr/>
	\$1683.86
W. A. Clark & Bros. 23% royalty....	387.29
	<hr/>
	\$1296.57

Figured by J. D. D.

Extension and footings correct—C. H. S.

Ore received and settlement correct—P. F. N.

Notations on back of foregoing sheet:

Net returns	1296.57
Leasers—one-half	648.28
Hospital dues, 6 persons.....	\$6.00
Indus. accident, 6 persons, ½ month each....	7.80
7680—John Ardession	20.00
7681—Pete Pagliero, loading car, \$12.00, 1 day 5	17.00
[58]	
7682—John Spehar, loading car.....	8.00
7683—Matt Suttley, loading car.....	8.00
7684—E. H. Walker, stock sub.	125.00
7685—Harry Daniels, 10 days.....	50.00
7686—Pete Giago, 13⅞ days.....	80.20
7687—Lawrence Mansanti, 14 days.....	80.85

7688—John Pagliero, 14 days.....	80.85
7689—Batt Tamietti, 14½ days.....	83.75
7691—Frank Tamietti, 14 days.....	80.85
	\$648.30

[59]

AMERICAN SMELTING AND REFINING CO.

East Helena Plant, East Helena, Mont.

Ore Settlement Sheet.

Mine—Goldsmith.	Date—Oct. 27th, 1921.
Bought of Crystal Copper Company. Shipping Point—Butte.	
Assays Per Ton.	Percentage.
Gold .43 Ounces	for 95 Per Cent @ \$20.
Silver 55.4 Ounces	for 100 Per Cent .99¼
Lead	for 90 Per Cent @
Copper	for 100% Dry (Wet Less 1.3) @
Insoluble	
Iron	
Manganese	
Lime	
Zinc	Over Per Cent @ .30¢
Sulphur	
Speiss	

Serial Number	Our Number	Gross Weight	% Moisture	Number of Sacks
2423	2444	56475	3.2	

Mine No.

28

Date of B/L.

Date of arrival, Oct. 19th, 1921.

Quotations:

Silver .991/4

Lead

Copper

AMERICAN SMELTING AND REFIN-
ING CO.

By M.

Keep this Statement.

Checked by W. [60]

Prices:

	Debit	Credit
Gold—Per Ounce, Less Treatment		8.17
Silver—Per Ounce 5% @ 991/4 per		
oz.	2.75	54.98
Lead—Per Ounce less — cts. per lb.		
Copper—Per lb. less — cts. per lb.		
Insoluble—Per Unit		
Iron—Per Unit		
Manganese—Per Unit		
Lime—Per Unit		
Zinc—Per Unit		
Sulphur and Speiss Treatment per ton		
11.00		

Totals15.31 63.15

Net value per ton.....47.84

Net Weight	Per Ton	
92870	47.84	2221.45
Freight		111.93
War Tax		3.36
Sampling		<hr/>
Totals		115.29 2221.45

Net Proceeds2106.16

Additional freight on bullion to New York 90% of the lead at \$6.35 per ton plus increase of \$6.15, effective August, 1920.

A charge of five dollars made for sampling on all lots of ore containing less than five tons. Rates subject to change without notice except on contracts for specified time or specified tonnage. [61]

Notations on back of foregoing sheet:

Leasers—one-half. 810.87

Goldsmith2448.28

Gross2106.16

Less 23% 484.42

Net1621.24

Deductions:

Indus. Accident & Hosp. dues for 6 persons

for October 21.60

7312—Pete Pagliero, car loader..... 12.00

7313—John Ardession, 20 days less \$1 hosp.

dues 94.00

7314—Stock sub. \$25 each—5 persons..... 125.00

7315—Monzetti 114.70

7316—Pagliero 114.70

7317—Tamietti, Batt 114.70

7318—Tamietti, Frank	114.70
7319—Giago, Pete	99.45
	\$810.85

[62]

AMERICAN SMELTING AND REFINING CO.

East Helena Plant, East Helena, Mont.

Ore Settlement Sheet.

Mine—Goldsmith. Shipping Point—Butte.
 Bought of Crystal Copper Company. Date—Nov. 26, 1921.

Assays Per Ton.		Percentage.	
Gold	.49 Ounces	for 95 Per Cent @ \$20.	
Silver	63.0 Ounces	for 100 Per Cent	.995/8
Silver	63.0 Ounces	5% Treatment	.995/8
Lead	Per Cent	for 90 Per Cent	
Copper	Per Cent	for 100% Dry (Wet Less 1.3)	
Insoluble	Per Cent		
Iron	Per Cent		
Manganese	Per Cent		
Lime	Per Cent		
Zinc	4.0 Per Cent	Over Per Cent	30¢
Sulphur	Per Cent		
Speiss	Per Cent		

Serial Number	Our Number	Car Number	Gross Weight	% Moisture	Number of Sacks
2719	2743	58902	116420	1.6	

Weight of Sacks

Mine No.

Date of B/L.

Date of arrival.

Quotations:

Silver, 995/8

Lead

Copper

AMERICAN SMELTING AND REFIN-
ING CO.

Keep this Statement.

Checked by W. [63]

By M.

Prices:	Debit.	Credit.
Gold—Per Ounce		9.31
Silver—Per Ounce.		62.76
Silver—Per Ounce.	3.14	
Lead—Per Cwt. Less ——— cts. per lb.		
Copper—Per lb. less ——— cts. per lb.		
Insoluble—Per Unit		
Iron—Per Unit		
Manganese—Per Unit		
Lime—Per Unit		
Zinc—30¢ Per Unit	1.20	
Sulphur & Speiss—Treatment, Per ton	11.00	
<hr/>		
Totals	15.34	72.07
<hr/>		
Net Value per ton		56.73

Net Weight.	Per Ton.	
114557	56.73	3249.41
Freight & War tax.....	146.52	
Umpire Assay		
Additional freight and War tax on Bullion to 90% of the Lead @ \$6.85 per ton.		
Sampling		
Totals	146.52	3249.41
Net Proceeds		2102.89
Notations on back of foregoing sheet:		
Returns from smelter.....	\$3102.89	
Less 34½% royalty.....	1070.50	
Net returns to us.....	\$2032.39	
Leasers—one-half	1016.195	
Hospital dues 6 persons, November.....		6.00
[64]		
Industrial Accident, 6 persons, November..		15.60
Check 7441—7442—Pete Pagliero, loading 3 cars		36.00
Check 7443—E. H. Walker, Secy., Stock Sub.		125.00
Check 7427—Frank Tamietti		100.00
Check 7444—Frank Tamietti		66.72
Check 7445—Batt Tamietti		166.72
Check 7446—Lawrence Mansanti		166.72
Check 7447—John Pagliero		166.72
Check 7448—Pete Giago		166.72
		1016.20

AMERICAN SMELTING AND REFINING CO.

East Helena Plant, East Helena, Mont.

Ore Settlement Sheet.

Mine—Goldsmith.

Shipping Point—Butte.

Bought of Crystal C. Co.

Date—Sept. 27, 1921.

Assays Per Ton.

Percentage.

Gold .43 Ounces

for 95 Per Cent @ \$20.

Silver 55.4 Ounces

for 100 Per Cent @ .991/4 per Oz.

Lead Per Cent

Copper Per Cent

Soluble Per Cent

Iron Per Cent

Manganese Per Cent

Zinc Per Cent

Copper 4.0 Per cent

Over Per Cent

.30

Sulphur Per Cent

Arise Per Cent

Serial Number	Our Number	Car Number	Gross Weight	% Moisture	Number of Sacks
2122	2122	58994	108100	3.5	
	Mine No.				Weight of sacks.
	23.				

Date of B/L.

Date of arrival, Sept. 24, 1921.

Quotations:

Silver .991/4

Lead

Copper

AMERICAN SMELTING AND REFINING CO.

By M.

Keep this statement.

Checked by W. [66]

Prices:	Debit.	Credit.
Gold—Per Ounce, Less Treatment		8.17
Silver—Per Ounce 5% @ .991¼ per Oz.	2.75	54.98
Lead—Per Cwt. less — cts. per lb.		
Copper—Per lb. less — cts. per lb.		
Insoluble—Per Unit		
Iron—Per Unit		
Manganest—Per Unit		
Lime—Per Unit		
Zinc—Per Unit	1.20	
Sulphur & Speiss, Treatment per ton	11.00	
	<hr/>	<hr/>
Totals	14.95	63.15
	<hr/>	<hr/>
Net value per ton.....		48.20
		<hr/>
Net Weight. Per Ton.		2514.02
104316 48.20		
Freight	125.61	
War Tax	3.77	
Additional freight on bullion to New York 90% of the lead @ \$6.35 per ton plus increase of \$6.15 per ton, effective August, 1920.		
Sampling	<hr/>	
Totals	129.38	2514.02
	<hr/>	
Net Proceeds		2384.64

(Testimony of Batt Tamietti.)

A charge of five dollars made for sampling on all lots of ore containing less than five tons. Rates subject to change without notice except on contracts for specified time or specified tonnage.

Notations on back of foregoing sheet:

Net Proceeds	\$2384.64
Less 23% Royalty	548.47
Net return from smelter.....	\$1836.17
Leasers—one-half	918.09

[67]

Check No. 7121—Frank Tamietti	\$183.62
Check No. 7122—Batt Tamietti	183.62
Check No. 7123—Monzette	183.62
Check No. 7124—Pagliero	183.62
Check No. 7125—Giago	183.62

\$918.10

Filed Nov. 2, 1923. C. R. Garlow, Clerk.

Filed Dec. 15, 1923. C. R. Garlow, Clerk. [68]

The WITNESS.—This is Mr. Alderson's writing on plaintiffs' proposed exhibit "E." I never saw this exhibit before. I did not receive the money which purports to have been paid to me on the back of that. That \$11.43 check I never have it. That is on the last car that was shipped, and I didn't receive that yet. On two of these other cars I didn't receive the money. For the cars that we shipped we paid \$25.00, each partner, for shares of stock and didn't receive the stock; we received this money but not the stock. On this one we received the money but not the stock. On this shipment of Jan-

(Testimony of Batt Tamietti.)

uary the 31st, in exhibit "E," we received the money that is purported to have been paid on the back, received a check, and I guess we received the stock, but not on this one. On March 3d, we did not receive the money that is purported to have been paid me on the back. The money that was paid me is what purports to have been paid here on these three returns.

Mr. McCRACKEN.—We ask to have this introduced.

Mr. WALKER.—We object for the reason it does not prove or tend to prove any issue in this case. It is not any evidence of any measure of damage, and cannot be construed as such, and is incompetent evidence to prove any issue in the case.

The COURT.—The Court will allow it in evidence on the theory that it may illustrate some issue, throw some light on the transaction between the parties. It is only going in as far as the writing on the back of these papers is concerned.

Mr. WALKER.—We note an exception.

(Papers received in evidence, marked Plaintiff's Exhibit "E," and are as follows:) [69]

PLAINTIFFS' EXHIBIT "E."

AMERICAN SMELTING AND REFINING CO.

East Helena Plant, East Helena, Mont.

Ore Settlement Sheet.

Mine—Goldsmith.	Shipping Point—Butte.
Bought of Crystal Copper Co	Date—Dec. 9th, 1921.
Assays Per Ton.	Percentage.
Gold .66 Ounces	For 95 Per Cent @ \$20.
Silver 86.4 Ounces	For 100 Per Cent .995/8
Silver 86.4 Ounces	5 Per Cent Treatment .995/8
Lead—Per Cent	For 90%
Copper—Per Cent	For 100% Dry (Wet Less 1.3)
Insoluble—Per Cent	
Iron—Per Cent	
Manganese—Per Cent	
Lime—Per Cent	
Zinc—3.5 Per Cent	Over Per Cent 30¢
Sulphur—Per Cent	
Speiss—Per Cent	

Serial Number	Our Number	Car Number	Gross Weight	% Moisture	Number of Sacks
2831	2900	57894	113240	6.6	

Mine No.

38.

Date of B/L.

Date of arrival, Dec. 3d, 1921.

Quotations:

Silver 995/8

Lead

Copper

AMERICAN SMELTING AND REFIN-
ING CO.

By M.

Keep this statement.

Checked by W. [70]

Prices	Debit.	Credit.
Gold—Per Ounce		12.54
Silver—Per Ounce		86.08
Silver—Per Ounce	4.30	
Lead—Per cwt. Less — cts. per lb.		
Copper—Per lb. Less — cts. per lb.		
Insoluble—Per Unit		
Iron—Per Unit		
Manganese—Per Unit		
Lime—Per Unit		
Zinc—Per Unit	1.05	
Sulphur & Speiss, Treatment per ton	11.00	
<hr/>		
Totals	16.35	98.62
<hr/>		
Net Value per ton.....		82.27

Net Weight	Per Ton	
105766	82.27	4350.68
Freight & War tax.....		142.62
Umpire Assay		
Additional Freight and war tax on Bullion to 90% of the lead @ \$6.85 per ton.		
Sampling		
Totals	142.62	4350.68

Net Proceeds4208.06

A charge of five dollars made for sampling on all lots less than five tons. Rates subject to change without notice, except on contracts for specified time or specified tonnage. [71]

Notations on the back of foregoing sheet:

Net Proceeds4208.06

Royalty at 34½%.....1451.78

Net returns from smelter.....2756.28

Leasers—one-half1378.14

Time and expense of man checking smelter...40.00

7505—John Ardession, 28 days, Nov. 10

days to Dec. 10, 1921, less Hosp. dues

\$2.00 188.00

7506—Frank Tamietti 230.03

7507—Batt Tamietti 230.03

7508—John Pagliero 230.03

7509—Lawrence Mansanti 230.03

7510—Pete Giago 230.03

\$1378.15

7504—\$25 deducted from each of above for check to E. H. Walker on stock sub.—making each check 205.03 instead of \$230.03. [72]

AMERICAN SMELTING AND REFINING CO.

East Helena Plant, East Helena, Mont.

Ore Settlement Sheet.

Mine—Goldsmith.	Shipping Point—Butte.
Bought of Crystal Copper Company. Date—Dec. 31st, 1921.	
Assays Per Ton.	Percentage.
Gold .46 Ounces	For 95 Per Cent @ \$20.
Silver 61.1 Ounces	For 100 Per Cent .995/8
Silver 61.1 Ounces	5% Treatment @ .995/8
Lead—Per Cent	for 90 Per Cent
Copper—Per Cent	For 100% Dry (Wet Less 1.3)
Insoluble—Per Cent	
Iron—Per Cent	
Manganese—Per Cent	
Lime—Per Cent	
Zinc—3.7 Per Cent	Over Per Cent 30¢
Sulphur—Per Cent	
Speiss—Per Cent	

Serial Number	Our Number	Car Number	Gross Weight	% Moisture	Number of Sacks
3008	3048	56538	101180	3.0	
	Mine No.				Weight of Sacks
	40				

Date of B/L.

Date of arrival, Dec. 27, 1921.

Quotations:

Silver 995/8

Lead

Copper

AMERICAN SMELTING AND REFINING CO.

By M.

Keep this statement.

Checked by W. [73]

Prices.	Debit.	Credit.
Gold—Per Ounce		8.74
Silver—Per Ounce		60.87
Silver—Per Ounce	3.04	
Lead—Per cwt. Less — cts. per lb..		
Copper—Per lb. Less — cts. per lb.		
Insoluble—Per Unit		
Iron—Per Unit		
Manganese—Per Unit		
Lime—Per Unit		
Zinc—Per Unit	1.11	
Sulphur and Speiss, Treatment per ton	11.00	
<hr/>		
Totals	15.15	69.61

Net value per ton.....		54.46
Net Weight. Per Ton.		
98145	54.46	2672.49
Freight and War tax.....	127.87	
Umpire Assay		
Additional freight and war tax on bullion to 90% of the lead @ \$6.85 per ton.		
Sampling		
Totals	127.87	2672.49
Net proceeds		2544.62

A charge of five dollars made for sampling on all lots of ore containing less than five tons. Rates subject to change without notice, except on contracts for specified time or specified tonnage. [74]

Net Proceeds	2544.62
Royalty 34½%	877.89
<hr/>	
Net from smelter.....	1666.73
Leasers—one-half	833.37
<hr/>	
Hosp. Dues 6.00, Industrial Accident, six persons, 15.60	21.60
Check No. 7578—John R. Ardession.....	82.50
Check No. 7579—E. H. Walker, Secy.	125.00
Check No. 7580—Lawrence Mansanti	126.16
Check No. 7581—John Pagliero	119.52
Check No. 7582—Batt Tamietti	126.16
Check No. 7583—Frank Tamietti	119.53
Check No. 7584—Pete Giago	112.90
<hr/>	
	\$833.37

[75]

Butte, Montana, January 31, 1922.

East Butte Copper Mining Co.

Pittsmont Smelter.

Ore Received from Crystal Copper Company,
Loaction—Goldsmith Mine. Lot No. 8519. Mine
No. 5. Date Sampled—January 24, 1922.

Car No. 57962. Wet Weight 88980. % Moisture
2.2. Dry Weight 87022. Elec. Cu.% .26. Ozs.
Ag. 47.8. Ozs. Au. .36. % SiO₂. 67. 8%
Fe & Mn. 8.9 % Zn. 4.8.

Copper—None.

Silver 2079.826 Ozs. @ 90% 1871.843 Ozs. @
99.625

1864.82

Gold 15.664 Ozs. @ 90%	14.098 Ozs. @	
\$20.00	.....	281.96
		<hr/>
Gross Value	.....	2146.78
Deductions.		
Treatment charges 43.511 Dry tons		
@ 10.00	.....	\$435.11
Freight 44.49 Wet tons @ 62½%		27.81
War Tax. Hauling Wet tons.		
Switching	.....	462.92
		<hr/>
Net Value	.....	1683.86
W. A. Clark & Bor. 23% Royalty....		387.29
		<hr/>
		1296.57

Figured by J. D. H.

Extensions and footings correct—C. H. S.

Ore received and settlement correct—P. F. M.

[76]

Notations on back of foregoing sheet:

Net returns	.....	1296.57
Leasers—one-half	.....	648.28
Hospital dues, 6 persons.....		6.00
Indus. Accident, 6 persons, ½ month each		7.80
7680—John Ardession	.....	20.00
7681—Pete Pagliero, loading car 12 1 day 5		17.00
7682—John Spehar loading car.....		8.00
7683—Matt Suttley loading car.....		8.00
7684—E. H. Walker, Secy., stock sub.		125.00
7685—Harry Daniels, 10 days.....		50.00
7686—Pete Giago, 13⅞ days.....		80.20
7687—Lawrence Mansanti, 14 days.....		80.85

7688—John Pagliero, 14 days.....	80.85
7689—Batt Tamietti, 14 days.....	83.75
7691—Frank Tamietti	80.85
	<hr/>
	\$648.30

[77]

ANACONDA COPPER MINING CO.,
WASHOE SAMPLER.

Butte, Montana, March 3, 1922.

Received from Crystal Copper Co.

(Frank Tamietti.)

Address—Butte, Montana.

Mine—Goldsmith. Class—Gold & Silver.

Weights.

Sampler No.	Pounds Gross	Weights Per cent Water	Pounds Dry	Per cent Electrolytic Copper	Ounces Silver	Ounces Gold
29173	73640	4.6	70253	—	19.6	0.17
Working Charge	Price per ton	Value	Draft No.			
Dollars	Dollars	Dollars				
9.45	13.14	461.56				
N. P. Ry. Freight		9.21				
		<hr/>				
		452.35				
W. A. Clark & Bro. Royalty	11½%	52.02	9385			
		<hr/>				
		400.33	9386			

Car No. N. P. 58763.

Zn. Pb. Insol. Fe.

Quotation and Settlement basis:

Feb. 28, 1922.

Copper	Silver	Gold	Zinc	Lead
	99 $\frac{5}{8}$	\$20.00		
Less 3¢	100%	90%	%	%

ANACONDA COPPER MINING CO.

WASHOE SAMPLER.

By L. R. MARGETTS,
Superintendent. [78]

Notations on back of foregoing sheet:

Net Proceeds	400.33
Leaser's one-half	200.16

Check No. 7822—John H. Bawden, loading car	9.00
Check No. 7823—Wm. Miller, loading car...	9.00
Check No. 7824—E. H. Walker, stock sub. . .	125.00
Check No. 7825—Frank Tamietti.....	11.43
Check No. 7826—Batt Tamietti	11.43
Check No. 7827—Lawrence Mansanti	11.43
Check No. 7828—John Pagliero	11.43
Check No. 7830—John Giago	11.44
	<hr/>
	200.16

Filed November 2, 1923. C. R. Garlow, Clerk.

Filed Dec. 15, 1924. C. R. Garlow, Clerk. [79]

The WITNESS.—I am familiar with the handwriting of Matt Alderson, manager of the Crystal Copper Company, which appears on plaintiff's proposed exhibit "I."

Mr. McCRACKEN.—We ask to introduce that handwriting.

Mr. WALKER.—Well, we object, of course, on the ground heretofore urged, to save the record, and on the further ground that Mr. Alderson is dead, and that any transaction has with him and the parties herein is incompetent.

The COURT.—The objection is overruled. It may be admitted for the purpose suggested by the Court.

(Marked Plaintiffs' "I," received in evidence, and is as follows:) [80]

PLAINTIFFS' EXHIBIT "I."

AMERICAN SMELTING AND REFINING
COMPANY.

East Helena Plant, East Helena, Mont.

Ore Settlement Sheet.

Assays Per Ton.	Shipping Point—Butte.
Mine—Goldsmith.	
Bought of Crystal Copper Company.	Date—Aug. 22d, 1921.
Gold .30 Ounces	for 95 Per Cent @ \$20.
Silver 33.5 Ounces	for 100 Per Cent @ .991/4
Lead—Per Cent	for 90 Per Cent @
Copper—Per Cent	for 100% Dry (Wet Less 1.3) @
Insoluble—Per Cent	
Iron—Per Cent	
Manganese—Per Cent	
Lime—Per Cent	
Zinc—4.0 Per Cent	Over 3 Per Cent @ 30¢
Sulphur—Per Cent	
Speiss—Per Cent	

Serial Number	Our Number	Car Number	Gross Weight	% Moisture	Number of Sacks
1715	1806	58163	108440	1.5	

Mine No.

17.

Date of B/L.	Weight of Sacks
Date of arrival, Aug. 17th, 1921.	

Quotations:

Silver .991 $\frac{1}{4}$

Lead

Copper

AMERICAN SMELTING AND REFIN-
ING CO.

By M.

Keep this statement.

Checked by W. [81]

Prices.	Debit.	Credit.
Gold—Per Ounce Less Treatment		5.70
Silver—Per Ounce 5% @ .991 $\frac{1}{4}$ per oz.	1.66	33.25
Lead—Per cwt. Less — cts. per lb.		
Copper—Per lb. Less — cts per lb.		
Insoluble—Per Unit		
Iron—Per Unit		
Manganese—Per Unit		
Lime—Per Unit		
Zinc—Per Unit	.30	
Sulphur & Speiss, treatment per ton	10.00	

Totals	11.96	38.95
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Net value per ton.....	26.99
------------------------	-------

Net Weight.	Per Ton.	
106813	26.99	1441.44
Freight		109.66
War tax		3.29
Additional freight on bullion to New York 90% of the lead @ \$6.35 per ton plus increase of \$6.15 per ton, effective August, 1920.		
Sampling		<hr/>
Totals		112.95 1441.44
Net Proceeds		<hr/> 1328.49

A charge of five dollars made for sampling on all lots of ore containing less than five tons. Rates subject to change without notice, except on contracts for specified time or specified tonnage.

Notations on back of foregoing sheet:

Net Proceeds	\$1328.49
23% Royalty	305.55

Net from smelter.....	\$1022.94
Leasers—one-half	511.47

Time counted to August 15, 1921. [82]

		Deduc.	Net.	Check.
Frank Tamietti—32 days	\$84.80	\$6.60	\$78.20	7132
Batt Tamietti—43 days	113.95	7.60	106.35	7133
John Pagliero—34 days	90.10	6.60	83.50	7134
Lawrence Monzetti—46 days	121.90	7.60	114.30	7135
Pete Giago—38 days	100.72	7.10	93.62	7136

Filed Dec. 15, 1924. C. R. Garlow, Clerk. [83]

(Testimony of Batt Tamietti.)

The WITNESS.—The ore from which I got those sample returns in exhibit "A" came from the place we were leasing on the 500 foot level, a thousand feet from the No. 1 shaft of the Goldsmith mine, from the ground we were leasing. While we were working taking out this ore we had another transaction with the defendant, and that was Mr. Alderson, the manager of the Crystal Copper Company, came with a fellow by the name of Frohock, from Boston, and they came down one morning in the winze to where we were working, and said they would be glad if we would buy some stock of the Crystal Copper Company. I said I was sure going to buy some, but I couldn't buy any stock for the other fellows, but I was going to-night to Mr. Frank Tamietti's house and we would speak there together and would decide how many shares we were going to buy. So that same evening we went to Frank Tamietti's house all together, myself and Mr. Pete Gaido, and Mr. Lawrence Monzetti and Mr. Frank Tamietti was there too in his house, and Mr. John Pagleero, and Mr. Frohock, and I understood he was from the Crystal Copper Company, and Mr. Alderson, the manager of the Crystal Copper Company, and so we five partners got together and we decided to buy five thousand shares but never had the money to pay right away, so we spoke together and agreed on the next shipment to pay so much, and decided to pay twenty-five dollars for every shipment we made from the ore, if they were satisfied, and then

(Testimony of Batt Tamietti.)

we spoke to Mr. Alderson and Mr. Alderson spoke with Mr. Frohock, and Mr. Frohock said that was satisfactory enough to the company, and he said, "You fellows have a nice showing there and I wish you would make a million dollars." And he said that was satisfactory [84] to the company, just to pay each twenty-five dollars until this one thousand shares was paid for; twenty-five dollars from each shipment, and the first car we shipped Mr. Alderson gave the money to the Crystal Copper Company, and the statement showed that we paid twenty-five dollars each for those shares. We shipped seven cars after entering into this agreement, and there was twenty-five dollars taken out of each car to pay for our stock. I only received five hundred shares, but paid for seven hundred, and haven't got the other two hundred shares yet. The stock was made out to me and each of my partners, and was signed by the Crystal Copper Company, and then below that signed by Mr. Matt Alderson, the general manager of the Crystal Copper Company. In this lead that we struck in the footwall, from the appearance of the ground I would say that lead ran about the same length as the other in the hanging, and would go from ten to fifteen feet west. Of course the back caught the south lead and caught the north lead in the same way. By the north lead I am referring to the lead in the footwall. This north lead showed up on the 500 foot level. The average width of it was two and a half to three feet. After we

(Testimony of Batt Tamietti.)

drove this cross-cut north into the footwall and discovered this lead, and after we had timbered right close to the breast, we extracted the ore on both sides of this cross-cut and we were intending to work the south lead, but the day after Mr. Alderson, the manager of the Crystal Copper Company came down to my house and told me he say, "I am sorry, Batt, but I have to cancel your lease." So I was surprised, I never said a word, but was surprised, because that was the first time after I was leasing there a long time that we [85] struck ore, and he chased me out. After a little arguing he asked me to show him where Mr. Lawrence Monzetti lived; so I showed him Mr. Monzetti's place, and he told him the same thing. Mr. Lawrence Monzetti asked him if it was for all of us and he said "yes," but then he told us, he said, "I see your car ain't complete yet; you got some ore there in the ore bin, and I don't think you have got fifty ton in there yet, and go up to-night and complete your car, and then your lease is cancelled." We went up at ten o'clock, we used to go out at ten o'clock at night to work, and so we went up there, me and Pete Gaido and Lawrence Monzetti, and tried to go to work, but Mr. Jim Delong, the engineer of the Crystal Copper Company, came over to me and said, "I am sorry, Batt, but I have got orders from Mr. Alderson to not lower you fellows down." I said, "I am not mad at you; I know you have nothing to do with this; you got your orders. We won't go down." We

(Testimony of Batt Tamietti.)

were not permitted to go down in the mine after that. Us three, Mr. Pete Gaido, myself and Mr. Lawrence Monzetti, were not permitted to go down, or do any work.

In working there, the manner in which us five partners worked, when we got down to the depth of 75 feet in the winze we decided to go on two shifts and so us three partners, me and Lawrence Monzetti and Pete Gaido went on one shift, and Mr. Frank Tamietti and John Pagleero went on another shift, and they employed a man to go with them, who went to work at day's pay; one went day shift and the other night shift. The date of the revocation was the 16th of January, 1922. [86]

Plaintiff's proposed exhibit "B" which you hand me I saw before. That is the check of Mr. Alderson, manager of the Crystal Copper Company, which he used to hand us, each partner. This is my signature on the back of Exhibit "B." I received this check.

Mr. McCracken.—We offer this in evidence.

(Received in evidence without objection, marked Plaintiff's Exhibit "B," and is as follows:) [87]

PLAINTIFF'S EXHIBIT "B."

Crystal Copper Co. No. 7689.

Butte, Montana, Feb. 1, 1922.

Pay to the Order of Batt Tamietti.....\$83.75
Eighty-three & 75/100.....Dollars.

CRYSTAL COPPER CO.

(9) By MATT W. ALDERSON.

To the First National Bank,
Butte, Montana, 93-2.

Endorsements on above exhibit:

This check is issued in payment for services of for bill rendered Jan. 31, 1922, or for his part Lot 5-E-B. If incorrect do not indorse but return to have matter made right. Endorsement and cashing means its acceptance in full.

(Endorsed): Batt Tamietti.

Paid 2-1-22.

Filed Nov. 2, 1923. C. R. Garlow, Clerk.

Filed Dec. 15, 1924. C. R. Garlow, Clerk. [88]

The WITNESS.—Plaintiff's proposed exhibit "D" which you show me, I saw before, and made it myself. This is a map of my idea of the way I express the winze and the way I express the lead, and the level and the bottom of the winze. It represents the 500 foot level and the winze and represents the pitch of the lead. The average pitch of the lead is 45 degrees south. The pitch of the winze is 35 degrees south. Exhibit "D" represents those pitches.

Mr. McCracken.—We ask to introduce exhibit "D," which is just a rough sketch of the way it appeared to this witness.

(Document received in evidence, marked Plaintiff's Exhibit "D.")

The WITNESS.—Plaintiff's proposed exhibit "C" I have seen before. I made it myself; it represents the 500 foot level and represents the winze and represents the lead, and represents the fault

(Testimony of Batt Tamietti.)

coming from the west side and represents the stopes and the drift.

The COURT.—How does that differ from the other?

Mr. McCRACKEN.—It is a different view; one view is looking one way and the other is looking the other way. We ask to introduce this in evidence, and will bring an engineer here to show the exact measurements to the backs.

Mr. WAGNER.—We would like the record to show our objection, no foundation laid as to the correctness; it doesn't show it was made from actual measurements of any survey; that it is in any way accurate, or that it expresses any more than a general [89] idea of the witness as to his conception of what the conditions were, and further, for the reason that there are no marks upon the paper itself of identification, showing what the various lines represent, if anything.

Mr. McCRACKEN.—We will connect it up and show what it is and all the measurements.

The COURT.—On the promise to connect up to show what it is, and the measurements, the objection is overruled.

(Document received in evidence, marked Plaintiff's Exhibit "C.")

The WITNESS.—The ore was a little straighter than the winze, pitching at about 45 degrees. The winze was 75 feet deep, and was 35 degrees. In my opinion as a practical miner, pitching straighter

(Testimony of Batt Tamietti.)

it would be a less distance to the 500 foot level, and would be about 60, 61 or 62 feet from the bottom of the 500 foot level through the lead. We stoped out 20 feet up and 20 feet east. We carried this drift going east 10 feet high, and took out ore over and above this drift; took for about 85 feet, four feet all around the drift, to relieve the timbers, above the timbers. In my opinion as a practical miner this ore would continue up to the 500 foot level. I have had experience in my 20 years of mining in estimating the amount of ore in place. In breaking out a set of ground in the mine for a regular square set of timber, you have to break six feet of ground high and six feet of ground wide and six feet of ground long, and that makes about 30 or 36 tons of ore; if it is ore it makes more and if it is common rock it makes less,—37 or 38 cars of ore in a square set of ground that is stoped. In driving a drift six feet high and [90] six feet wide at the bottom, and rounded off at the top and pulling five feet of ground, would make 26 or 28 cars of rock.

Q. Now, in your opinion as a practical miner, about how many tons of ore would you say that is left over and above what you had taken out here as described in the hanging-wall side, the south side of the stope, over and above what you had taken out?

Mr. WAGNER.—We object as incompetent, irrelevant and immaterial, based on speculation and

(Testimony of Batt Tamietti.)

conjecture, not giving any facts upon which the jury may form an estimate.

The COURT.—Overruled.

Mr. WAGNER.—Exception.

A. My opinion is we left there about one thousand tons.

Q. And from the money you received from the smelter returns, from what you shipped, about what was the average value in dollars for the ore on the hanging-wall side?

Mr. WAGNER.—We object to that as incompetent, irrelevant and immaterial; the smelter returns are the best evidence. And it is not a proper proof of damage in this case.

The COURT.—Overruled.

Mr. WAGNER.—Exception.

A. Eighty-one dollars a ton.

Q. What was the average percentage of the gross value of this that your five partners received; what did the five of you, what was the average that the five of you received; what percentage out of the gross value?

A. Maybe out of the gross value it was not quite one-fourth, but maybe fifteen to seventeen dollars every one hundred dollars, that is all. [91] That is after taking the cost, including our own labor. I estimate that we could mine this one thousand tons out at an average profit to ourselves of sixteen to seventeen dollars per tone, the five of us.

I worked here in the camp over twenty years, and am able to distinguish between what is called

(Testimony of Batt Tamietti.)

waste or barren rock and ore. That which we struck in the footwall after driving that drift north was ore. This ore appeared on the 500 foot level, and in my opinion continues from the bottom of this drift through to the 500 foot level. I saw ore in the winze on the footwall side. This winze was in 35 feet before we started and the ore was started on the 500 foot level this winze right in the lead, and was two or three feet wide, and they shipped ore from that winze to a depth, I guess, of 35 feet. I don't know how it happened they quit. The ore cut off at a depth of 35 feet until was only about 6 inches, and it appeared in the bottom of the winze to go to nothing. There is a drift along the footwall vein on the 500 foot level. The north lead was driven all in the lead, drove right in on the lead going west. This ore on the footwall side on the bottom of the drift was right in the hanging-wall laying flat, with a pitch of all ore around for over 100 feet, and we sunk the winze right in the ore. The company took out the ore there on the 500 foot for over 100 feet around, and then it cut off on the east side by a fault, and cut off on the west side too.

Q. At what point from the bottom of the drift or the drift at the hanging-wall side did you drive the cross-cut north into this vein of ore in the footwall?

Mr. WAGNER.—We object to that, may it please the Court, [92] because the question assumes that they drove it north into the ore on the

(Testimony of Batt Tamietti.)

footwall; assumes that there was ore on the footwall.

The COURT.—Overruled.

Mr. WAGNER.—Exception.

A. About 20 feet east of the winze in the footwall.

Drove it north from the drift, right into the footwall, and went about twenty feet. The pitch of the ore on the footwall vein was about the same pitch as the other ore we had south, going with the same distance, about 45 degrees. When we cross-cutted this vein in the footwall there was ore in the bottom of the cross-cut; it was on each side, overhead and west, and east side, all around. The lead where we cut it in the west side was two feet wide, and the east side was three feet. The ore on the 500 foot level is about two feet to two and a half feet wide.

Q. Now, as a practical miner, what in your opinion would be the number of tons of ore from the bottom of the cross-cut between these two faults, up to the 500 foot level?

Mr. WAGNER.—May it please the Court, we object on the ground and for the reason that the answer calls for an approximation of the witness, based upon an assumption that something exists which has not been shown by the evidence. The jury certainly cannot base any verdict upon assumptions. It must be upon direct evidence of the existence of a fact. The question is based upon an assumption, and the answer of the witness must necessarily be upon conjecture.

The COURT.—Overruled.

(Testimony of Batt Tamietti.)

Mr. WAGNER.—Exception.

A. My opinion, like a miner, would be something like about a thousand tons of ore.

After purchasing this stock in the Crystal Copper Company I kept myself informed as to the market value of the [93] Crystal Copper Company stock. Between the time I purchased the stock and the present time the highest market value of that stock was two dollars and five cents, or something like two dollars. I estimate that I have been damaged in the difference between twenty-five cents and two dollars on three hundred shares of stock,—or for two hundred shares of this stock which was never delivered to me. All the stock that has been paid for by the copartnership has been received by the different copartners except four hundred shares. There is thirteen hundred shares of stock issued to the copartnership under the contract of purchase.

If I found no ore in working down there I would not have received any compensation for my services. There was no agreement to pay me anything.

Cross-examination by Mr. WALKER.

The WITNESS.—There were five of us in this partnership, Mr. Pete Gaido, Frank Tamietti, Lawrence Monzetti, John Pagleero, and myself. Frank Tamietti is here in court at present, as is also Pete Gaido. Frank Tamietti is my brother. My brother Frank Tamietti did not join me in this suit as plaintiff.

I testified a while ago about how much rock was to be found in a square set. There may be thirty-six

(Testimony of Batt Tamietti.)

to thirty-eight cars of rock in a square set. If it is ore it will make more and if it is waste it will make less quantity. I would estimate from working a long time in the mine and in knowing pretty near but of course not exactly, but I could tell from that experience what it is. It would just simply be a guess. I never measured [94] and that is my opinion or my guess. If there was a body of ore above the roof here and I didn't know what the width of that vein would be, I couldn't estimate how much ore would be contained in a square set and how much waste would be contained in a square set, but would just have to guess at it. My testimony has been based upon that fact, that I would have to make a guess.

I worked there from the 26th of June, went to work, I and my partners, on the 26th of June, 1921, on night shift, and worked up until the evening of January 16, 1922, a period of seven months and sixteen days. In that time we took out ten car-loads of ore, nine car-loads containing fifty tons and one about 45 tons. For the ore that I took out in those shipments I did not receive my full portion of the net profits, all but about eleven dollars and forty-three cents, and those two hundred shares. I refused to take \$11.28 that Mr. Alderson tendered, because he wanted to make me sign a paper that I didn't have to sign, and I refused to take the money. I know that my other copartners, Frank Tamietti, John Paglerro and Lawrence Monzetti took their share. They also took their share of the stock.

(Testimony of Batt Tamietti.)

Redirect Examination by Mr. McCRACKEN.

The WITNESS.—After having gotten in on our chutes and slides in this hanging-wall lead, it would take from twenty to thirty days to have stoped this ore out on the 500 foot level. It would take from thirty to forty days to have driven in the footwall vein and stoped that ground out to the 500 foot level. [95]

This \$11.28 that Mr. Walker spoke about was handed to me by Mr. Alderson, and he offered to give it to me with a piece of paper that he wanted me to sign, and said, "Before I give you this check I want you to sign this." I said that I couldn't read it. He said, "You can read it, and after you read it I want you to sign this." I said, "I won't sign this, I got this in the hands of my attorney, and I have to see if it is all right." He didn't offer me anything else at that time; didn't offer me any stock. Once after that down town he offered me the stock to settle with the company, because he wanted me to settle the lawsuit. I still have the two hundred shares of stock coming, which is all paid for.

Witness excused. [96]

Mr. McCRACKEN.—Plaintiffs object to the introduction of Exhibit "J," upon the grounds and for the reasons that the same is irrelevant and immaterial and not within the issues of this case, furthermore the same does not prove or tend to prove any of the issues of this case.

The COURT.—The objection is overruled.
Exception.

(Testimony of Batt Tamietti.)

Mr. McCracken.—Plaintiffs object to the introduction of Exhibit “K,” upon the grounds and for the reasons that the same is irrelevant and immaterial and not within the issues of this case, furthermore the same does not prove or tend to prove any of the issues of this case, also it fails to show any consideration for any pretended release as to the 300 shares of stock claimed by Monzetti, as he received nothing more than that which he had coming at that time.

The COURT.—The objection is overruled.

Exception.

Mr. McCracken.—Let the record show that plaintiffs make the same objection to exhibit “L” as plaintiffs made to exhibits “J” and “K.”

The COURT.—Let the record so show and that the objection is overruled.

Exception.

Mr. McCracken.—Plaintiffs make the same objection to exhibit “M” as made to exhibits “J,” “K” and “L.”

The COURT.—Let the record show the same objection and that the objection is overruled.

Exception.

Mr. McCracken.—Plaintiffs object to the introduction of exhibit “N,” upon the grounds and for the reasons that the same is irrelevant and immaterial and not within the issues of this case, furthermore the same does not prove or tend to prove any of the issues of this case, also it fails to show any consideration for any pretended release

(Testimony of W. W. Pennington.)

by Monzetti, as he received nothing more than that which he had coming at that time.

The COURT.—The objection is overruled.

Exception.

TESTIMONY OF W. W. PENNINGTON, FOR PLAINTIFFS.

W. W. PENNINGTON, called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination by Mr. McCracken.

The WITNESS.—My name is W. W. Pennington; I reside in Butte and am a surveyor and civil engineer.

Mr. WALKER.—We admit the qualifications of the witness as a mining and civil engineer.

The WITNESS.—I made Plaintiff's Exhibit "G" which you hand me. It represents a cross-section of the 500 foot level and the winze and vein. The winze is pitched 35 degrees, and the vein 45 degrees.

Mr. McCracken.—We ask to introduce this exhibit "G" in evidence.

Mr. WALKER.—We would like to ask a few preliminary questions.

Examination by Mr. WALKER.

The WITNESS.—I personally made this exhibit "G." But did not make it from measurements which I actually took on the ground, but based it upon a hypothetical question that was handed to me. It is not made from any facts that were ac-

(Testimony of W. W. Pennington.)

tually disclosed to me from actual observation of the mine or the winze in that point or the level. I never saw the property at all.

Mr. WALKER.—We object to it as incompetent, irrelevant and immaterial, not the best evidence, and nothing to show that it is correct.

Mr. McCracken.—It is to be used to illustrate a hypothetical question.

The WITNESS.—This is true and correct according to the hypothetical question propounded to me. [97]

The COURT.—I think I'll allow its admission as a basis of the hypothetical question, subject to cross-examination.

Mr. WALKER.—Exception.

(Map marked Plaintiff's Exhibit "G," received in evidence.)

The WITNESS.—Plaintiff's Proposed Exhibit "H" I saw before, and made. It represents a longitudinal section of the same mine or portion of the mine, and drawn from figures given to me for the basis of a hypothetical question propounded to me.

Mr. McCracken.—We ask to have exhibit "H" admitted.

Mr. Wagner.—We object because it is not the best evidence.

The COURT.—You state that it is offered for the basis of a hypothetical question?

Mr. McCracken.—Yes.

The COURT.—The objection is overruled.

(Testimony of W. W. Pennington.)

(Paper received in evidence, marked Plaintiff's Exhibit "H.")

The WITNESS.—From this map here, assuming a winze was sunk on the 500 foot level at an angle of approximately 35 degrees, to the depth of 75 feet, and there they encounter a vein of ore going down, which they find to be at an angle of about 45 degrees, the distance from the bottom of the 75 foot winze through the vein of ore at the 500 foot level, would be 61 feet as I remember it.

Assuming that in sinking this winze they encounter a fault in the west and that appears to dip 65 degrees to the east, and in drifting it extends about 9 feet and a half west of the winze, in the bottom, and in drifting east they encounter splitting up of the vein, and this appears to dip back to the west, approximately 80 feet, figuring the basis approximately $119\frac{1}{2}$ feet, from the bottom of the drift on the east to the west of the winze, [98] the distance between the two points on the 500 foot level, between these two faults as they came back, would be about 80 feet. Assuming that the plaintiffs have stoped east of the winze 20 feet, and 20 feet up, and they have carried their drift ten feet high to the east end of the drift, and have come back and taken four feet off of this ten feet, for a distance of about 85 feet or within 15 feet of the end of the drift, the width of the vein being approximately three feet, averaging about three feet, and assuming that the walls run parallel on the 500 foot level, there would be about 1103 tons of

(Testimony of W. W. Pennington.)

ore left between what is stoped out and drifted out on the 500 foot level.

Assuming a vein of ore in the footwall is approximately 100 feet long, lying between these two faults, and pitches at an angle of about 45 degrees, and averages two and a half feet to three feet, an average width of about two feet and a half, there would be about 1275 tons of ore between the bottom of vein of ore on the 500 foot level.

Witness excused. [99]

TESTIMONY OF LAWRENCE MONZETTI, FOR PLAINTIFFS.

LAWRENCE MONZETTI, one of the plaintiffs, called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination by Mr. TYVAND.

The WITNESS.—My name is Lawrence Monzetti, and I am one of the parties named in the complaint as plaintiff. I have resided in this community 16 years except one year in the army. I am a quartz miner and have followed that occupation about seven years. On or about the 26th day of June, 1921, I was acquainted with a man by the name of Matt Alderson, and at that time was acquainted with the other plaintiffs in this case; had known my partners twelve or fourteen years. About that date I had transactions with the Crystal Copper Company, about getting a lease on the Goldsmith property. My five partners, Frank

(Testimony of Lawrence Monzetti.)

Tamietti, Batt Tamietti, Pete Gaido, and myself agreed to get that lease, and we got the lease from the Crystal Copper Company through Matt Alderson. He was general manager of the Crystal Copper Company.

Q. What were the terms of that lease that you entered into at the time?

Mr. WAGNER.—We object, may it please the Court, for the reason that it appears that Matt W. Alderson was agent and general manager of that company, and who negotiated the transaction, and that he is dead, and for reasons already advanced, this witness is incompetent to testify against the defendant. For the further reason that the complaint upon its face shows that the plaintiffs were operating under a license, and not under a lease and for that reason they are limited in their recovery, if any, to damages, if any, they have [100] sustained for ores actually mined, and for the further reason that the alleged contract is void under the statute of frauds, in that it is based upon oral transactions and has for its purpose the acquirement by oral transactions of an interest in mining property. For the further reason that the complaint shows upon its face that, and the evidence thus far discloses, that no partnership existed between these parties, and that they have standing in court, if at all, as individuals, and not as a mining partnership.

The COURT.—I will overrule the objection for the present.

(Testimony of Lawrence Monzetti.)

Mr. WAGNER.—Exception.

A. The terms of the lease was to go down and sink the winze on the 500 foot level of the Goldsmith mine, northwest of the shaft about 1,000 feet.

The winze already extended down 35 feet south, and under the terms of the lease the work that was to be done was to go down 15 feet more. We found some ore after we got down about 48 feet. We were to have any ore we discovered in the distance between 35 and 50 feet. Under that lease we were to get all the ore we could find, as far up as the 500 foot level, and as far east as the ore would go within the mining claim, and as far west as the claim would go. The royalties we were to pay on twenty-five to thirty dollar rock was \$11.30, and and from thirty to fifty, \$23.00 royalty, and from fifty to a hundred was \$34.50, I think, and from one hundred to one hundred and fifty was \$46.00, and from one hundred and fifty to two hundred was \$56.00. The Crystal Copper Company was to furnish the equipment and the hoisting of rock and ore. We used to pump the water. The Crystal Copper Company furnished the pump. The [101] company furnished the air for the drills. The company furnished the pump, and we used to do the work. We started on that lease on the 26th day of June, 1921. The first day we went there we went down and put in the pump and connected the pipe on it, and pumped the water. The men who went down to work were myself and Mr. Pagleero and Pete Gaido. The first work we did

(Testimony of Lawrence Monzetti.)

was pumping the water. After we had the water pumped out we started to sink and clean up; started to pump because the water was standing there for quite a while and the ground was kind of loose and soft. We dug that winze as far as 75 feet. When we dug to the depth of 500 feet we were not supposed to go any further, and we notified Mr. Alderson to see if we couldn't sink any more, and he said to go ahead, and follow the ore, he said, as far as it goes, as far as went to, as far as the ore goes. We found ore above that, found the ore about 48 feet deep, that is from the top of the winze down 48 feet we found ore. Mr. Alderson said to extend the ore down as far as went on the ore. The ore went down as far as 75 feet. The conditions of the extension of the lease when we had the 500 foot down, as far as we could go, was the same as before, the same terms and conditions, that is, we were to have the ore from the depth where we reached up to the 500 foot level, up to the east end of the claim and to the west end of it, if it should go there. After we got to the depth of 75 feet we struck a fault; we then notified Mr. Alderson that it wouldn't pay to sink any more, and he said to sink a sump enough to hold the water before the two shifts; and then we started drifting on the ore, and we drifted 100 feet east, and about 9 or 10 feet west; the ore was about 14 feet wide some places there at the winze, and about 20 feet east of the winze it was about $3\frac{1}{2}$ or 4 feet, the average width [102] of the vein from the winze

(Testimony of Lawrence Monzetti.)

east to about 100 feet was from about three to three and a half feet. When we got about 100 feet from the winze we found it split up. Where the ore was split up there about 100 feet east of the winze it was split with a slant west about 80 degrees. When we were working in the winze we struck the ore in the east corner. The ore in the winze as we went down was tipping about 65 degrees west. There was a fault on the west side; it was dipping east about 65 degrees. The winze was sunk down at an angle of 35 degrees; the vein dipped, at an angle of about 45 degrees, dipping south. The ore that we found in the winze we shipped; also shipped the ore that we took out in the drift, under the name of the Crystal Copper Company, and got returns on that ore; shipped ten cars, and got returns on all of it. I don't know whether or not Mr. Batt Tamietti got any returns; don't know anything about any returns he got. We timbered the drift. We cross-cutted north in the footwall lead. We stoped north or drifted the cross-cut north under the same conditions as before, and under the same terms, cross-cutted north about 35 feet, and struck a lead there about two feet and a half wide. This lead showed up at the top of the cross-cut; the vein was running south—well, the vein was running east and west, where we cross-cutted north. We found a vein on the east side of the cross-cut; also on the south side of the cross-cut, or the west side of the cross-cut, both sides of the shaft, and found it at the bottom

(Testimony of Lawrence Monzetti.)

of the cross-cut; it was about two feet wide at the west side of the cross-cut, and about two feet and a half wide on the east side of the cross-cut. It was about the same at the top of the cross-cut. We took samples from the cross-cut, took one sample from [103] the vein, and sent them out to be assayed; gave them to the foreman. Saw the return of that sample after. Mr. McCarthy assayed the sample that we sent up. Mr. Frank Shields had the sampling done for us. He was foreman of the Crystal Copper Company. The Crystal Copper Company paid for the assaying of the sample. We had samples taken of the work we done there every day or every other day.

In the drift we timbered and put in chutes and slides along the stopes. The ore showed up all along the top of the drift. We stoped out ore in our lead or vein; stoped out in the drift about 20 feet up and 20 feet along. Three of us were working on each shift. We had another man working besides the five partners, a man by the name of John Ardenison; and paid him wages. The partners paid him, the five of us. We started to work two shifts around the middle of August, and paid Mr. Ardenison about five dollars and a quarter. The average wage scale in this camp at that time was four dollars seventy-five cents a day. I did not receive any wages when I worked up there. After we had been working there for a while we did other work besides what I have mentioned.

(Testimony of Lawrence Monzetti.)

We cross-cutted north in the footwall lead, and those other things I told you.

We worked a little over two months I guess in the winze and drift under the 500 foot level, under the lease in this case, before we shipped any ore. We were doing dead work. Nobody else worked in that winze and drift in the place we were working, besides our five partners in the time between the 26th day of June, 1921, and the 16th day of January, 1922, except the man we hired [104] there. Nobody else besides my partners took out any ore in that particular place, that is in the drift and the hanging-wall vein and in the footwall vein. We shipped the first carload of ore around in August some time. In the month of October we had dealings with Mr. Alderson, the manager of the Crystal Copper Company about some stock, or with the Crystal Copper Company. The transaction was to buy some stock from the Crystal Copper Company, and at that time there was present Mr. Alderson and Mr. Frohock. Those present were me and Frank Tamietti and Pete Gaido and Mr. Alderson and Mr. Frohock. The transaction was to buy some stock from the Crystal Copper Company. We agreed to buy five thousand shares between the five partners, and the condition was to pay twenty-five cents a share, paying twenty-five dollars on each shipment of ore; that is, twenty-five dollars on each partner's share, making \$125.00 on each car to be applied on the purchase price. We shipped seven cars thereafter, and received

(Testimony of Lawrence Monzetti.)

seven hundred shares of stock. In the month of January, 1922, about the 16th, I saw Mr. Alderson. He came down to my house and told me that the lease was cancelled. Frank Tamietti came with him. He said that we could go up and finish the car, and then it was all off. I went out to the mine that night and tried to go to work but they wouldn't let me go down. The engineer wouldn't let me go down to work. He said he had orders from Mr. Alderson not to lower us down. I have been willing and ready to go to work and carry on my lease and was at that time. At the time I tried to go down Frank Tamietti and Pete Gaido and myself were there,—Batt Tamietti. I have been willing to carry on the work there and extract the rest of the ore we had in the place on the hanging-wall lead and footwall lead, but have not extracted any ore since [105] that time; haven't extracted any ore after the 16th of January, 1922, because they closed us out. The walls in the hanging-wall lead were parallel along the whole length from the winze to the east end of the drift. In my experience as a miner I would say that the vein we had exposed along the hanging-wall lead from the winze to the east end of the drift, about 100 feet, extended up to the 500 foot level.

Q. And in your experience as a practical miner what would you say as to the values in that particular vein, whether they would continue or not?

Mr. WALKER.—We object to that as calling for a conclusion of the witness and for conjecture

(Testimony of Lawrence Monzetti.)

and speculation of an interested party to the case.

The COURT.—Well, let him state for whatever it is worth. Of course, this can be covered by the instructions.

Mr. WALKER.—Exception.

A. Yes, sir, they would continue.

Of course, they may sometimes be richer and sometimes a lower grade. In my opinion the values in the ore would continue about the same up to the 500 level, as they had been in the drift where we had drifted and shipped the ore. It was a two compartment winze that was sunk down from the 500 foot level, about twelve feet by six feet; the twelve feet was east and west and six feet high. [106]

Cross-examination by Mr. WALKER.

The WITNESS.—I know what Plaintiff's Exhibit "A" is which you have handed me, and those are the returns from the smelter that Mr. Batt Tamietti had in his possession. I know what they are and understand them, but cannot read much. I understand them by the figures and my partner told me what it was. I know that these are returns from the smelter for ores I and my partner shipped, and know that it was on these that they made settlements with me as shown on the back here,—Mr. Alderson's writing. I write a little bit; write my name and know it when I see it. I know what Exhibit "J" is, which you have shown me and saw it before. I saw the signature endorsed on the back and that is my writing when I

(Testimony of Lawrence Monzetti.)

sold to Mr. Alderson. This is a check dated March 4, 1922, for \$100.00 payable to me, and signed by Matt W. Alderson personally. I received 700 shares of stock as a result of this mining operation there, and was entitled to one thousand shares. I got all I paid for. Up to the time the lease was cancelled I had only paid for seven hundred shares, and that I obtained.

On the 16th of January Mr. Alderson told me that the lease was cancelled. I had moneys coming at that time as a result of ores I had shipped to the smelter, and received the moneys that was due me for ores I had shipped. At the time the lease was cancelled and right afterwards, I was paid for everything I had taken out and shipped, for every thing I had mined and shipped. I still claim my right for 300 shares of stock on our agreement, previous to the time the lease was cancelled. I was paid for it. There was no shipment made after January [107] 16th that I didn't get the entire share of my proceeds from. We were not supposed to pay for the stock except by the shipments. Everything I paid for in the way of stock I received. What I want to say is that I could have paid for the additional three hundred shares of stock if I had been permitted to continue mining.

I have got an idea how much rock there is in a square set, but might be mistaken in a few cars. Whatever I would testify to would be just by guesswork. When I say that this ore ran up to 500, that is my own knowledge, because I saw it on

(Testimony of Lawrence Monzetti.)

the 500; saw the ore all up through that; could see all the way; east of the winze. Didn't see the ore east of the winze where there wasn't any winze. We went east 100 feet and ran into a fault. I could look up to the level on the 500 but could not see the ore through the ground; could see it on the level up above. Nobody could see the ore that was between the level and the 75-foot level of the winze. You could see the ore up to the level from the bottom of the winze—I am guessing at what was between the 500-foot level and the bottom of the winze. Nobody can see through the ground. Therefore it would be my guess about it. But when I saw the vein up on the other level it must come up, it had come up as it was the same vein. It went up on the hanging-wall and footwall both. We sank the winze on the footwall. We drove a drift 35 feet and by reason of that fact I tell the jury I could tell what was in the footwall up on the level; the winze was up on the next level. I could see the winze right through [108] because it showed up there, between the 35 foot drift and the 500 foot level. We sank the winze on the same vein, and we could see it. We could not see the ground between the 500 foot level and the 35 foot drift, but we could see the vein along the winze, and it showed right up. After we got beyond where we had drifted we couldn't see unless we put in another round of holes. I want to tell about the ore where I actually saw it, namely, on the 500 foot level and on the bottom in the cross-cut, the

(Testimony of Lawrence Monzetti.)

35 foot cross-cut. The balance of it I am simply guessing at; guessing about the quantity and the quality.

We shipped a carload of ore from the footwall; sank the winze; after that did not ship any ore from the footwall; did not explore the footwall after that. We didn't do anything further with the cross-cut because they cancelled the lease. We were shipping ore from August until January. We didn't do any more exploration work in the footwall from August until January, because we had something else to do. We were trying to drift before we did that. If the ore was richer on the footwall than the hanging-wall, we would not have taken the footwall ore first. We couldn't do that. We had to follow the hanging-wall lead first, before we could go on the footwall lead. We knew what the values of the footwall were, because we took samples there. I saw the ore assayed; didn't see the man assaying that rock but saw the returns; didn't follow the sample from the time I took it out of the vein to the assay office; and don't know whether the sample which was assayed was the sample which was taken from the vein or not.

[109]

This is my signature on Defendant's Exhibit "N"; this is my signature on the back of Defendant's Exhibit "J." That is my name on the front; this is my name on the front of Defendant's Exhibit "L." That is my name on the back; this is my name on Defendant's Exhibit "K"; that is my

(Testimony of W. R. Richards.)

signature on Defendant's Exhibit "M," and that is my name on the front.

Witness excused. [110]

TESTIMONY OF W. R. RICHARDS, FOR PLAINTIFFS.

W. R. RICHARDS, called as a witness on behalf of plaintiffs, having been first duly sworn, testified as follows:

Direct Examination by Mr. TYVAND.

The WITNESS.—My name is W. R. Richards; I reside in Walkerville, have resided in this community since '89, and am a miner. I am familiar with what is known as the Goldsmith mine, and knew where it was at on the 26th day of June, 1921. At that time I was somewhat familiar with what is known as the 500 foot level in the mine, and with the winze about one thousand feet north-west of the main shaft of the 500 foot level. Was familiar with the level known as the 500 foot level. I was down in the winze at about that place, that is about 35 feet deep, sunk on the 500 foot level, at an angle of about 35 degrees. I am somewhat familiar with the vein that was in the hanging-wall there. I continued that winze down, as I understood, from about 25 feet on the footwall vein, but I didn't cross-cut to the hanging-wall vein. I was not down there at any time after the leasers and the plaintiffs in this case had been working down there. I was there before the leasers at the present time

(Testimony of W. R. Richards.)

worked there, that is, the plaintiffs in this case. There was a footwall lead on the 500 foot level in the drift, there were two veins, there was a split in the vein. There were two veins; there was a cross-cut driven from the 500 foot level north and encountered the hanging-wall vein, which carried high value, and then the footwall vein was about four or five feet wide, and had value in spots. The hanging-well vein [111] showed up on the 500 foot level, that is the 500 foot level, the bottom of the 500 foot level. I don't know how far it went up, never prospected above it. There was a faulted condition come in there, and in fact I never had an opportunity. I shipped ore from the foot-wall lead, shipped somewhere about a carload. Some cars are larger than others. That was shipped to East Helena, and the amount they gave was somewhere around about seventy dollars a ton, and we had to do with it. I didn't ship any ore from the hanging-wall lead.

Cross-examination by Mr. WAGNER.

The WITNESS.—I was working under a contract myself, on the 500 foot level. The winze that has been testified to in this case was the winze that I myself sunk; helped to sink the winze some 25 feet. That winze was sunk by me in endeavoring to get out the ores under my contract. We didn't sink that winze deeper, because we struck too much ore, and were making too much money. We started on the contract we had in March and quit in June. I just fixed it up in pretty good shape, and then

(Testimony of W. R. Richards.)

it was taken away from me. We quit in June and started in March; sank the winze in March. The condition at the bottom of the winze, with respect to any ore being in sight, was that it was a mere prospect as far as I was concerned; I couldn't see through the ground. I had ore in sight in the bottom; and paying ore, at the 25 foot level,—above the 500 foot level, on the footwall vein, we had ore there. I just told you why I couldn't [112] ship it. I was in partnership with Tom Melville, Constant Melville and Frank Tamietti, working there. We did not throw up the lease because we couldn't make it pay. I was thrown out of the lease. I have got use for everything that is right. I didn't bring any action for damages; couldn't afford to.

Witness excused. [113]

TESTIMONY OF PETER GIADO, FOR PLAINTIFFS.

PETER GIADO, one of the plaintiffs, called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination by Mr. TYVAND.

The WITNESS.—My name is Pete Giado. I am a miner, and have been following mining for 15 or 16 years in Butte. I am one of the plaintiffs in this case. On or about the 26th day of June, 1921, I was acquainted with Matt Alderson, and at that time was acquainted with the other plaintiffs in this case. On that day I had business

(Testimony of Peter Giado.)

transaction with Mr. Alderson, as manager of the Crystal Copper Company.

Q. What was the transaction?

Mr. WAGNER.—If the Court please, may we understand that the same objection we have heretofore made goes to this testimony as well.

The COURT.—That will be the understanding, that the objection continued throughout the case to all evidence of this character.

The WITNESS.—On the 500 foot level we know of a place that was to be leased, and Batt Taimetti and John Pagleero and Frank Tamietti and myself, we know the conditions and we would agree to go down and sink this winze on the 500 foot level, which was about one thousand feet northwest of the main shaft, and we were to sink that winze and go east and west as far as the ore would go. The agreement was to sink the winze to complete fifty feet. The royalties were to be so much per cent of the ore. The Crystal Copper Company was to furnish the tools and supplies, powder and timber and air, and to hoist [114] the ore and waste. We commenced working on that lease the 26th of June, 1921, and those going to work there were me and Mr. Frank Tamietti and Lawrence Monzetti. We went up and the first work we did was to establish the pump and to connect the pipe. The winze had 14 or 15 feet of water and we started to pump the water and when we got that out there was a few carloads to pump out, and then we got timbers and fixed the winze and sank. Sank it

(Testimony of Peter Giado.)

75 feet, complete with a sump. We put it about 50 feet down on the hanging-wall lead, and we supposed it was good ore, and had Mr. Alderson, the general manager of the Crystal Copper Company come down and look at it, and he said it was looking fine, and then our partners asked for permission to sink some more, and Mr. Alderson said, "Boys, sure, go ahead and sink the winze as far as the ore goes, and the more you sink the more we are going to have ore up above." We were to have extension of the lease on the same terms and conditions, and with the same royalties. The same way with the ore extending west and east and north and south. We followed the ore down the winze 70 feet, and it then happened that a fault was coming in from the west end, and cut all the ore out in the bottom of the winze. As soon as we struck this fault we went in the office to Mr. Alderson, and told him we struck the fault, and he came down the next day and looked, and there was five partners at that time working, Batt Tamietti and Frank Tamietti, and Lawrence Monzetti and John Pagleero and myself, and he said it didn't pay to sink any more; Mr. Alderson say, "No, boys, you might as well not. We need some ore, go ahead and go east and west [115] and get all the ore you can as quick as you can." We did drifting at the time; we drifted east about 100 feet and then a fault cut the ore off. The ore was cut off at the east end because it was dipping west pretty straight, cut about plumb, about 80 degrees or something like

(Testimony of Peter Giado.)

that. We shipped the ore we found in the winze and in the drift; think we started to ship in August; think we had shipped some time in July and got the return in August.

The vein going east along the drift, south or far to the east side of the winze, there was a big body of ore some places 14 or 15 feet in the bottom of the winze, and the back of the hanging-wall lead. Further east in the winze it would get a little narrow. It was about three and a half or four feet wide on the average all the way through. We stoped out some along the drift; I think we stoped about 20 feet up, and 20 or 25 feet along at the hanging-wall lead, on the east end of the drift, the east side of the winze; at the west of the drift we took some out close to the fault, and the bottom of the winze was about ten feet or nine feet in the fault, went up in the vein, and we followed the fault and took the ore out about 14 feet on the west end.

We did timbering all over. At the east end when we started to stope we put in about three set and sealed it up and got the waste out, the way we were supposed to do. When we sunk the winze and struck the fault 25 feet we were of the opinion the ore didn't go any deeper; it was a regular fault that was coming from the west, and we thought that was the end of the ore. We thought there was no more ore, and that's [116] the reason we didn't go any deeper. When we started drifting east we found there was ore below the drift

(Testimony of Peter Giado.)

on the bottom; of course I don't know how far on the bottom the ore go; we always have ore on the bottom of the winze; we take out all kind before we put in the timber. The hanging-wall vein was at an angle of about 45 or 50 degrees, but I never had time to find out exactly, just my idea of it. The winze was at an angle of about 35 or 40 degrees.

Besides what I have already stated we also drove a cross-cut on the north on the footwall lead. On the footwall we ran in about 25 or 30 feet, and it happened that I was first one that blasted the first round, and I tapped the lead. That drift was cut about 45 feet straight north from the hanging-wall lead,—from the winze. I never measured how far from the winze east we cross-cutted north, but about 35 or 40 feet; am not so sure of that, never measured it. When we got into the footwall lead we went through it; it just happened we got the lead and we got one assay sampled. The lead to the west was about three feet wide and on the east end it would show about two feet; we were not clear through. The vein showed up at the top and bottom and in the east and west side of the drift, or at the cross-cut.

We commenced shipping ore in August, but am not sure of the date. I saw Plaintiff's Exhibit "A" which you show me, before. Batt Tamietti is a pretty square man and he always looked after those things. Plaintiff's Exhibit "A" is a statement return of the smelter on the ore we shipped to East Helena. We got the ore from the Goldsmith

(Testimony of Peter Giado.)

mine, and this is from the ore we found in the bottom of the winze and along the winze below the 500 foot level. [117]

In my opinion as a practical miner I would say the ore we discovered along the drift extended up to the 500 foot level. The walls of the vein were parallel. The trend of the vein throughout along the line was parallel. As a practical miner in my opinion I would say that the values of the ore we found along the drift that we shipped to the smelter would continue up in the way I referred, up to the 500 foot level; the ore was right up to the 500 foot level; of course we cannot go in the ground, but it was up to the 500 foot level, and in my opinion the value would be about the same, some a little higher and some a little lower, but it is pretty hard to tell that. It was pay rock all the way up.

In the month of October we had a stock transaction with Mr. Alderson, manager of the Crystal Copper Company. One day we were working down in the mine and Batt Taimetti and my other partners were there, and Mr. Alderson the general manager of the Crystal Copper Company and a director from Boston, if I am not mistaken, Mr. Frohock, came down in the place and Mr. Alderson said, "This man wants to see this place look nice," and it was in good shape, and he said, "Boys, it is in fine shape," and he said, "This is the one place I like to come down to see the ore and pay rock," and it happened that Mr. Frohock, he said, "Well, boys, do everything fine and I hope you make a

(Testimony of Peter Giado.)

million dollars, and the company makes something," and he said, "Boys, if you are willing to buy some stock from the company, it would be nice and better for us, and the stock is going up soon." [118] And Batt Tamietti, he told us, we can see about that; of course we cannot buy any stock until we see the other partners some place and we talk over about it. And so then we met down at Frank Tamietti's house and we had a talk about buying stock there. We agreed to buy five thousand shares, one thousand each for the five partners. We had no money to buy at the present time, and we thought if the company give us a chance to pay at twenty-five dollars every car we shipped. We shipped after that seven cars, and there was twenty-five dollars on each car deducted from the shipment that we made, and we got a certificate for 500 shares. The certificate was in my name and the name of the Crystal Copper Company. I received 500 shares. I paid for 300 more but didn't receive that stock. Received five hundred shares from five car shipments. The other two cars that were shipped I didn't receive any shares of stock for, but there were deductions made from my checks on each car. I have not received the shares of stock.

On the 16th of January, 1922, I did not see Mr. Alderson but Batt Tamietti and Lawrence Monzetti met down at Batt Tamietti's house and he told me Mr. Alderson was down and told Lawrence Monzetti the lease was cancelled on the 16th

(Testimony of Peter Giado.)

day of January, 1922. On that day he went up to the Goldsmith mine to go to work, three of us, Batt Tamietti, Lawrence Monzetti and myself, and Batt Tamietti met the engineer from the Goldsmith mine and he told Batt, "I am sorry, but I can't lower you down any more, you fellows," he said, "that is the orders from the Crystal Copper Company and Mr. Alderson." We tried to go down to work that night but it was no use. I told the engineer it was all [119] right "if you got the order." I was willing and ready to keep on with the lease, to keep on with the work, and have been ever since.

At the present time four of us men worked in the winze and drift below the 500 foot level, and after we got through sinking the winze there were five, Frank Tamietti, came to work then, but he was sick at first. After we sank the winze and got through with it us five partners were working together and nobody else, but after that there was a boy working for us, John Ardenson was working there for us five partners, and we paid him five dollars and twenty-five cents a day.

In my opinion it would take about thirty days to have stoped out the ore left in the hanging-wall lead at the time were ejected from the lease on January 16, 1922, with the six of us working there. In the footwall lead it might give us more trouble, but in my opinion it would take about forty days to have stoped out the ore there, or forty-five days, six men working. There was nobody else working

(Testimony of Peter Giado.)

down in the drift and in the cross-cut and in the winze besides us five partners and Mr. Ardenson when we were working there. We were the only ones working there, the only ones taking out ore.

Cross-examination by Mr. WALKER.

The WITNESS.—I testified that I had 300 shares coming, and am sure of that. I testified in this same case in this same court formerly.

Q. I will ask you if at that time you were not asked this question and if you didn't make this answer: "Q. And you got one hundred shares for each carload. A. Yes, we have [120] one hundred shares for each car we shipped. Q. And the other two cars that had been shipped, did you or not pay the twenty-five dollars there? A. Yes, we paid twenty-five dollars there, and we never had a certificate on that 200 shares we paid for; the company had it in hand." Now, which is correct; your testimony then at the last trial or your testimony now?

A. Just the same; I had 300 shares paid for and I didn't receive.

I testified at the last trial I had 200 coming. I paid for 300 shares. I suppose the receipt is 200 shares, but I got 300 shares coming; had 300 shares coming. I might be mistaken when I testified at the last trial I had 200 coming, and I don't

(Testimony of Peter Giado.)

know for sure if it was 300 shares. I heard Batt Tamietti testify. I have the same amount of shares coming that he has. If he testified he had 200 shares coming I still maintain that I have 300 shares coming. I got 700 shares altogether, and paid for 700 shares. I got 500 and still have 300 more coming, which is paid for and I didn't get. I did not pay for more stock than Batt Tamietti; paid for just the same amount, and was entitled to the same amount that Batt got.

When I started working in the winze it had been sunk to a depth of 35 feet. That is the same winze Mr. Richards testified he had worked in. We started in to work where he left off, and sank about 12 or 14 feet before encountering ore; encountered ore when we sank about 45 or 50 feet. There was ore where Richards left off on both sides of the winze, the [121] footwall. Of course when we started it was a little small streak in the bottom of the footwall but it wasn't paying rock, just a streak, just a lead and not pay rock. I heard Mr. Richards testify that he had pay ore there when he left.

When this lease was cancelled did not offer me 200 shares of the stock that I claimed I paid for; didn't see Mr. Alderson but he told Batt Tamietti to offer that stock; I didn't see him but Batt told me. I refused to take it. Mr. Alderson offered the stock to Batt for me and Lawrence Monzetti. I didn't take it because I had no reason to take it;

(Testimony of Peter Giado.)

didn't want it. We didn't want it because we had been thrown out of the lease.

Redirect Examination by Mr. TYVAND.

The WITNESS.—The reason why I refused to accept the stock was that Mr. Alderson wanted me to dismiss this suit before he delivered this stock to me.

Witness excused. [122]

TESTIMONY OF HARRISON E. CLEMENT,
FOR PLAINTIFFS.

HARRISON E. CLEMENT, called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination by Mr. McCRACKEN.

The WITNESS.—I am general manager of the Crystal Copper Company and have been such since the 1st of May, 1923. I took Mr. Alderson's place at that time. You served a *subpoena duces tecum* on the foreman of the mine the other day, but agreed to excuse him if I should get everything you demanded if possible.

Q. Have you any other settlement sheets from the smelter that have been shipped from the winze on the 500 foot level, involving the ore that is in controversy here in this case, since August 22, 1921, to the present date, that has not been introduced in evidence?

A. Do you mean of the ore that has already been mined?

(Testimony of Harrison E. Clement.)

Q. That has already been mined.

A. There are six settlement sheets from the ore in controversy; that is on these plaintiffs, the ore taken out by these plaintiffs.

Q. I will ask you to examine Plaintiff's Exhibit "A" and Plaintiff's Exhibit "E," together with the settlement sheets which you offered, and ask if they are here,—any of them duplicates of the ones already in evidence.

A. You have two duplicates in your exhibits here, two settlements of November 31st.

Q. I will ask you if plaintiff's proposed exhibit "O" is not a duplicate of that which is already in evidence?

The COURT.—I think you better look these papers over some time during the noon hour and find out what you want. [123]

Mr. McCracken.—Very well, your Honor, but that will complete our case, as far as I know.

The COURT.—That is all you want to put in.

Mr. McCracken.—Yes.

Mr. Wagner.—I'll state, may it please the Court, I think we are in a position to put on a little evidence, if it is agreeable to the plaintiffs, in order to expedite matters, and let them re-open again at two o'clock.

The COURT.—Very well, we will do that.

Mr. Walker.—If the Court please, we now offer in evidence Defendant's Exhibits "J," "K," "L," "M," and "N."

(Documents received in evidence, marked Defendant's Exhibits "J," "K," "L," "M," and "N," and are as follows:) [124]

DEFENDANT'S EXHIBIT "J."

No. 53.

Butte, Montana, March 4, 1922.

Pay to the order of Lawrence Monsanti ..\$100.00
One Hundred and no/100Dollars.
To W. A. Clark & Brother,
93-1 Bankers 93-1,
Butte, Montana.

MATT W. ALDERSON.

(Endorsed across face:)

W. A. Clark & Brothers, Bankers.

Paid.

Mar-6-1922.

Butte, Montana.

Endorsements on back of above exhibit:

Lawrence Mansanti. Paid.

Filed Dec. 15, 1924. C. R. Garlow, Clerk. [125]

DEFENDANT'S EXHIBIT "K."

Butte, Mont. Mar. 4, 1922.

Received of Matt W. Alderson One Hundred Dollars in full for my 200 shares of stock in the Crystal Copper Co. and for any real or implied right which I may have for the purchase of 300 shares additional.

LAWRENCE MOZETTI.

Witness.

Filed Dec. 15, 1924. C. R. Garlow, Clerk. [126]

DEFENDANT'S EXHIBIT "L."

Crystal Copper Co. No. 7827.

Butte, Montana, March 4, 1922.

Pay to the order of Lawrence Monsanti ..\$11.43
Eleven & 43/100.Dollars.

CRYSTAL COPPER CO.

(9) By MATT W. ALDERSON.

To

The First National Bank,

Butte, Montana 93-2.

Endorsements on back of above exhibit:

This check is issued in payment for services of
for bill rendered to Mar. 4, 1922, for his part Car
58763. If incorrect do not endorse but return to
have matter made right. Endorsement and cashing
means its acceptance in full.

LAWRENCE MANSANTI.

Paid: 3-6-22.

Filed Dec. 15, 1924. C. R. Garlow, Clerk. [127]

DEFENDANT'S EXHIBIT "M."

Crystal Copper Co. No. 7687.

Butte, Montana, Feb-1, 1922.

Pay to the order of Lawrence Mansanti ..\$80.85
Eighty & 85/100Dollars.

CRYSTAL COPPER CO.

(9) By MATT W. ALDERSON.

To

The First National Bank,

Butte, Montana, 93-2.

Endorsements on back of above exhibit:

This check is issued in payment for services or for

bill rendered to Jan. 31, 1922, or for his part Lot 5-E, B. If incorrect do not endorse but return to have matter made right. Endorsement and cashing means its acceptance in full.

LAWRENCE MANSANTI.

Paid 2-1-22:

Filed Dec. 15, 1924. C. R. Garlow, Clerk. [128]

DEFENDANT'S EXHIBIT "N."

Butte, Montana, March 4th, 1922.

Received of the Crystal Copper Company, a corporation, of Butte, Montana, the sum of Eleven & 43/100 Dollars, being my proportionate share in all ores shipped in the name of the Crystal Copper Company, a corporation, by me, as a copartner with others with whom I was interested in a certain lease.

This payment is acknowledged by me as full and complete settlement and satisfaction of any and all claim or claims that I may have against the said Crystal Copper Company, and as full and complete satisfaction of any and all demands that I may have against the Crystal Copper Company, the corporation aforesaid.

LAWRENCE MOZETTI.

Witness:

MATT W. ALDERSON.

Filed Dec. 15, 1924. C. R. Garlow, Clerk. [129]

TESTIMONY OF JOSEPH V. FLAHERTY,
FOR DEFENDANT.

JOSEPH V. FLAHERTY, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. WAGNER.

The WITNESS.—I am official court stenographer of the Second Judicial District Court, and am the same J. V. Flaherty who took the stenographic notes of the testimony given at the former trial in the case entitled Lawrence Monzzetti, Pete Gaido and Batt Tamietti, plaintiffs, versus Crystal Copper Company a corporation, defendant, No. 362, being the case and action now on trial, which trial was had on Friday, November 2d, 1923. At that time I made stenographic notes of the testimony and proceedings given at the trial. The document which you hand me entitled in the District Court of the United States, in and for the District of Montana, No. 362, is the transcript of the testimony given at that trial and is true and correct as far as I am able to make it, transcribed by me personally from shorthand into long-hand. Pages 54 to 64 is the testimony of Matt W. Alderson given at that trial, and those pages contain all of the testimony given by Mr. Alderson at the former trial. He was called as a witness for the plaintiffs.

Mr. WAGNER.—We now offer in evidence the testimony given by Matt W. Alderson, who is now

(Testimony of Joseph V. Flaherty.)

deceased, given at the former trial when he appeared as a witness.

Mr. WALKER.—I suppose the record will show that Mr. Alderson is dead and buried.

The COURT.—There is testimony here to that effect from two or three witnesses.

(Testimony of Matt W. Alderson given at former trial, marked Defendant's Exhibit "P," and read in evidence as follows:) [130]

DEFENDANT'S EXHIBIT "P."

MATT W. ALDERSON, called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination by Mr. McCracken.

Q. State your name, please.

A. Matt W. Alderson.

Q. Where were you employed during the year 1921?

A. At the Goldsmith mine in Walkerville.

Q. And what Company owned the Goldsmith mine or was working the Goldsmith mine at that time?

A. Crystal Copper Company.

Q. And what position did you hold with the Crystal Copper Company?

A. I was General Manager.

Q. General manager and superintendent?

A. Yes, sir.

Q. I hand you Plaintiff's Exhibit "A," and ask you to state whose writing that is on the back of those smelter returns, if you know?

A. They are all in my writing.

Q. The money was divided up as it purports to be, between the different leasers on this lease?

A. Yes, sir.

Q. Have you any other smelter returns with you that the plaintiffs and their copartners shipped from this lease? A. Yes, sir.

Q. Will you produce them, please? [131]

Mr. McCracken.—I ask that these be marked as exhibits.

(Marked "E.") I wish to introduce these.

Mr. Walker.—We have no objection.

Q. The writing on the back is your writing, is it, Mr. Alderson?

A. It is, in every instance but one.

Q. And which one is that?

A. The last one.

Q. Have you the original lease from the Ellingwoods as Trustee, and Paul Gow? A. No, sir.

Q. Have you the original assignment from Paul Gow to the Crystal Copper Company? A. No.

Q. Do you know where they are?

A. I presume they are in possession of the Crystal Copper Company.

Q. Did you ever see the original lease?

A. Yes, sir.

Q. You say they are in possession of the Crystal Copper Company, do you mean at their office in the east some place?

A. No, sir, they are on file in the office—I am not sure I think they are just copies in Butte. The others are on file in Boston perhaps.

Mr. McCRACKEN.—I ask that these be marked.
(Marked “F.”)

Q. I hand you Plaintiff’s Exhibit “F,” what purports to be a copy of the lease from C. W. Ellingwood, Carter E. Ellingwood, and J. K. Heslet, and P. H. Gow, also purports to be a copy of the assignment from P. H. Gow to Crystal Copper Company. I will ask you to examine it and state whether or not they are true and [132] correct copies of lease and assignment.

Mr. FRANK WALKER.—To which we object as incompetent, irrelevant and immaterial.

The COURT.—What is the purpose of this?

Mr. McCRACKEN.—To show there is nothing in the original lease and assignment to stop the Crystal Copper Company as lessee from subleasing or assigning any part of their rights under the lease.

The COURT.—What if there was? It has nothing to do between these parties; it might have between Mr. Gow. Sustained.

Q. Have you the two hundred shares of Crystal Copper Company’s stock in your possession that belongs to one of the plaintiffs, Batt Tamietti?

Mr. FRANK WALKER.—To which we object as incompetent, irrelevant and immaterial; no bearing on the issues in this case at all.

Mr. McCRACKEN.—That is one of the parts of the damages, they are withholding the stock.

The COURT.—Overruled.

Exception.

A. I don't know as I fully understand the question or the purport of it.

The COURT.—Read the question.

Q. (Question read.)

A. No, sir, I have not.

Q. Do you know where those two hundred shares are? A. I sold them. [133]

Q. You sold them? A. Yes, sir.

Q. You never delivered them?

A. I offered to deliver them and they wouldn't accept them. I offered them to the lawyers, the attorneys.

Q. There was a string tied to that offer, was there not? A. No, sir.

Q. We had to dismiss the suit then pending?

A. Certainly.

Q. And at the time you made the offer, state who those lawyers were you made the offer to.

A. To the gentlemen here, the plaintiffs' attorneys.

Q. Mr. Tyvand and myself? A. Yes, sir.

Q. And at that time you had two hundred shares of stock belonging to the plaintiff Pete Gaido, did you not?

A. I had two hundred shares belonging to Pete Gaido and two to Batt Tamietti, yes, sir.

Q. And you told us you would not deliver them unless we dismissed a certain suit then pending?

A. Of course not.

Q. And you made full settlement on nine cars of ore shipped by these plaintiffs and their copartners,

you paid them all the interest they had coming on the cars?

A. No, sir, there is \$11.43 due Batt Tamietti and \$11.42 due to Pete Gaido.

Q. That is on the ten cars? [134]

A. No, sir, the nine cars.

Q. Didn't they ship ten cars altogether?

A. Nine cars.

Q. I hand you Plaintiff's Exhibit "E" and Plaintiff's Exhibit "A," and state whether or not if those are not the correct settlement sheet from the smelter on all ores shipped that these plaintiffs mined at the Goldsmith mine in this winze and stope and drift from there?

A. These are not in order, and it will take me a little time to check them.

The COURT.—What is the object?

Mr. McCracken.—To show there is ten cars shipped. He has given me five more and we introduced five.

The WITNESS.—I beg your pardon, I gave you four and you had five.

The COURT.—If you have them, they will show for themselves. Anything further on direct?

Q. Are you familiar with the market value of Crystal Copper Company stock? A. Yes, sir.

Q. Since October, 1921? A. Yes, sir.

Q. What was the highest market value of this stock since October, 1921 to the present time?

A. It approached two dollars.

Q. That is per share? A. Yes, sir. [135]

Q. You were general manager all the time between

June, 1921 to February, 1922, were you not, Mr. Alderson?

A. Why practically most of that time; they changed my title two or three times, but in effect I was in absolute charge.

Q. General manager? A. Yes, sir.

Q. And during that time, how many men working down in the mine did you have on the pay roll working for day's pay?

Mr. WALKER.—To which we object as immaterial.

The COURT.—What is the object?

Mr. McCRACKEN.—To show that the mine was worked almost wholly by lessors.

The COURT.—Ask him so. Don't be beating about the bush. The objection is sustained.

Q. During all of this time the mine was worked entirely by leasers, all the development work was done by leasers? A. It was not.

Q. What development work did you do that you didn't lease?

Mr. WALKER.—Objected to as immaterial.

The COURT.—Sustained.

Q. What portion of the mine did you lease?

Mr. WAGNER.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—He may answer. Overruled.

A. Possibly as much as one-third, to a half at various times.

Q. You had one leaser up there by the name of Mr. Seam? A. Yes, sir.

Q. And Mike Zugal?

Mr. WALKER.—We object to this as immaterial. I don't see [136] the bearing unless to encumber the record.

The COURT.—What is the object?

Mr. McCRACKEN.—To show that the mine was worked almost entirely by leasers.

The COURT.—He has answered to the proposition, unless you are prepared to show the contrary. Sustained.

Cross-examination by Mr. WALKER.

Q. You say at one time you had two hundred shares of Crystal Copper Company stock belonging to Gaido and 200 belonging to Tamietti?

A. Yes, sir.

Q. Did you have that as an individual, that is you personally? A. Yes, sir.

Q. Did the Crystal Copper Company have anything to do at all with that stock?

A. Nothing whatever.

Q. In so far as the transaction with reference to that stock is concerned, counsel asked the question, or the matter was brought out, with reference to you tendering the stock back to these men. Did the Crystal Copper Company have any connection at all? A. Nothing whatever.

Mr. TYVAND.—We object to that as calling for a conclusion of the witness, and not proper cross-examination.

The COURT.—Overruled.

Exception.

Q. I will ask you whether or not the Crystal Copper Company [137] had anything to do with any stock transaction with any of the plaintiffs in this case, Gaido, Tamietti or Monzetti?

Mr. McCRACKEN.—That is objected to as not being proper cross-examination.

The COURT.—I think so. Sustained.

Redirect Examination by Mr. McCRACKEN.

Q. At the time you made this tender to Mr. Tyvand and myself you were general manager of the Crystal Copper Company at that time, were you not? A. I was.

Q. And acting as such? A. Yes, sir.

Recross-examination by Mr. WALKER.

Q. You were asked the question you were acting as such. Were you acting in the capacity of manager of the Crystal Copper Company when you tendered this stock?

A. No, sir, I was acting as individual. I wanted to get the case settled.

Q. Who was the owner of the stock at that time?

A. I was.

Redirect Examination by Mr. McCRACKEN.

Q. You came up there and wanted us to dismiss the case against the Crystal Copper Company. You were general manager at the time? [138]

A. Yes, sir.

Q. You were doing this for and on behalf of the company, were you not?

A. I had settled the case with the plaintiffs on the

first day of February, and they assigned the stock back to me in the settlement.

Q. They assigned it back to you? A. Yes, sir.

Q. Have you got that assignment with you?

A. Yes, sir, I have. (Handing document to counsel.)

Q. Where did you get this stock?

A. I bought it from the brokerage firm of E. H. Walker Company, Boston, Massachusetts.

Q. You didn't receive this personally from the plaintiffs? A. Yes, sir, I did.

Q. Whereabouts?

A. In the city of Walkerville.

Q. As a matter of fact those five hundred shares of stock that the east sold to the brokers was in Butte?

A. No, sir, I got those certificates if you want them. I will give you those too. (Handing document to counsel.) I was holding those five hundred in trust for them, and they assigned them over to me. Here is the five hundred each they sold.

Q. There is the five hundred shares they sold.

A. Yes, sir. [139]

Q. Did you explain to them when you got them to assign this what the transaction was?

A. Most assuredly they knew what they were doing. I afterwards paid Mr. Monzetti for his shares, and have a receipt from him in full.

Q. Did you ever pay Mr. Tamietti, Batt Tamietti, one of the plaintiffs, for any assignment?

A. No, sir, I offered it to him and he wouldn't take it.

Q. You never gave him anything for signing it?

A. Yes, sir.

Q. What did you give him?

A. No, I didn't give him anything for signing it.

Q. Did you ever give Pete Gaido, one of the plaintiffs, anything for signing it?

A. No, sir, I didn't; they accepted my word for the two hundred shares that was coming to them.

Recross-examination by Mr. WALKER.

Q. You say you had settled with these plaintiffs.

Mr. McCracken.—We ask to strike that as a conclusion of the witness. It is a voluntary statement.

The COURT.—He may ask the question, and you can interpose an objection.

Q. You say Mr. Alderson, you had settled with these plaintiffs. A. Yes, sir.

Q. What do you mean by that; explain to the Court and jury, if you will.

Mr. McCracken.—We object to that as calling for a conclusion [140] of the witness and not proper cross-examination.

The COURT.—He may answer, if that is the objection, overruled.

A. I took a check to the plaintiffs in the case for what was due to them on a carload, and they had about an hour's time hauling me over the coals for cancelling the lease, but we talked over the situation for an hour, they did most of the talking, and when they got through, they concluded to settle everything amicably, and took a check for eighty dollars

and something, one of the checks that's in the case here, eighty dollars and something, and took the two hundred shares of stock coming to them, and the payment on the next car of ore that was on the way to the smelter, and we would call everything square.

Q. Did they agree to the settlement to which you refer? A. Yes, sir.

Mr. TYVAND.—To which we object as calling for a conclusion of the witness.

The COURT.—I don't see any settlement there. He wasn't giving them anything only what they were entitled to, according to his own statement. Sustained. There is no settlement there as I understand it. Proceed.

Witness excused. [141]

Mr. WAGNER.—I now desire to offer in evidence, may it please the Court, a tender which is one of the court records here.

(Document received in evidence and is as follows:)

(Title of Court and Cause.)

“To Batt Tamietti and Pete Gaido, Two of the Plaintiffs Above Named, and to Messrs. Tyvand & McCracken, Your Attorneys:

Gentlemen:

Comes now the defendant and offers to plaintiff, Batt Tamietti, eleven & 43/100 (\$11.43) dollars, and to the plaintiff, Pete Gaido, eleven & 42/100 (\$11.42) dollars, and renews its tender of the same and hereby deposits the said sums amounting to twenty two & 85/100 (\$22.85) dollars together with

accrued interest thereon from the 16th day of January, 1922, to the present time, which interest is at the legal rate, which said sums, including principal and interest, amounting to twenty-eight (\$28.00) dollars.

This payment and tender is made for the use and behoof of the said Batt Tamietti and Pete Gaido plaintiffs above named in full settlement of balance due to them on ores shipped prior to the 16th day of January, 1922, and on all ores shipped and mined at and from the Goldsmith Mine, Butte, Silver Bow County, Montana for and on account of work and services done and performed by said parties in connection with the plaintiffs or otherwise, in full settlement of all claims and demands which said Batt Tamietti and Pete Gaido may have against the defendant.

Dated this 2d day of December, 1924. [142]

C. S. WAGNER,

WALKER & WALKER,

Attorneys for Defendant.

Service of the foregoing offer and tender admitted and refused this 2d day of December, 1924.

H. A. TYVAND &

F. E. McCRACKEN,

Attorneys for Plaintiffs."

Mr. WAGNER.—I think counsel for the plaintiffs will agree that the money is on deposit with the clerk?

Mr. TYVAND.—Yes.

Mr. WAGNER.—We are ready to go ahead and put on the balance of our testimony, but if the

(Testimony of Harrison E. Clement.)

plaintiffs wish to finish their case, why we will agree to it.

The COURT.—They may.

TESTIMONY OF HARRISON E. CLEMENT,
FOR PLAINTIFFS (RECALLED).

HARRISON E. CLEMENT, a witness heretofore called on behalf of the plaintiff, recalled to the stand for further

Direct Examination by Mr. McCracken.

The WITNESS.—During the recess of the court at noon I ascertained that there were two duplicates of the smelter returns in exhibit "O" with smelter returns already in evidence,—one duplicate between the two exhibits. The ones which are not duplicates are dated October 17th and November 10th.

Mr. McCracken.—I wish to offer exhibit "O" in evidence.

(Document received in evidence, marked Plaintiff's Exhibit "O" and is as follows:) [143]

PLAINTIFFS' EXHIBIT "O."

AMERICAN SMELTING AND REFINING CO.

East Helena Plant, East Helena, Mont.

Ore Settlement Sheet.

Mine—Goldsmith.	Shipping Point—Butte.
Bought of Crystal Copper Co.	Date—Oct. 17th, 1921.
Assays Per Ton.	Percentage.
Gold— .36 Ounces	for 95 Per Cent @ \$20.
Silver— 43.1 Ounces	for 100 Per Cent @ .991 $\frac{1}{4}$
Lead—Per Cent	for 90 Per Cent
Copper—Per Cent	for 100% Dry (Wet Less 1.3)
Insoluble—Per Cent	
Iron—Per Cent	
Manganese—Per Cent	
Lime—Per Cent	
Zinc—2.9 Per Cent	Over Per Cent 30¢
Sulphur—Per Cent	
Speiss—Per Cent	

Serial Number	Our Number	Car Number	Gross Weight	% Moisture	Number of Sacks
2311	2369	58048	110680	2.9	
	Mine No.				Weight of Sacks.
	26.				

Date of B/L.

Date of arrival—Oct. 10th, 1921.

Quotations:

Silver, .991 $\frac{1}{4}$

Lead

Copper

AMERICAN SMELTING AND REFIN-
ING CO.

By M.

Keep this statement.

Checked by W. [144]

Prices.	Debit.	Credit.
Gold—Per Ounce Less Treatment		6.84
Silver—Per Ounce 5% @ 991 $\frac{1}{4}$ per oz.	2.14	42.78
Lead—Per cwt. Less ——— cents per lb.		
Copper—Per lb. Less ——— cts. per lb.		
Insoluble—Per Unit		
Iron—Per Unit		
Manganese—Per Unit		
Lime—Per Unit		
Zinc—Per Unit	.87	
Sulphur and Speiss. Treatment per ton	10.00	
Totals	13.01	49.62
Net value per ton.....		36.61

Net Weight.	Per Ton.	
107470	36.61	1967.24
Freight	128.52	
War tax	3.86	
Additional freight on bullion to New York 90% of the lead @ 6.35 per ton plus increase of \$6.15 per ton, effective August, 1920.		
Sampling		
Totals	132.38	1967.24

Net Proceeds1834.86

A charge of five dollars made for sampling on all lots of ore containing less than five tons. Rates subject to change without notice, except on contracts for specified time or specified tonnage. [145]

Notations on back of foregoing sheet:

Voucher No. 3726. Mont., Oct. 21.

Goldsmith—2369-26	1834.86
Less 23%	422.02
Total	1412.84
Leasers—one-half	706.42
Monzetti—Check 7277	143.33
Pagliero—Check 7278	143.33
Batt Tamietti—Check 7279	143.33
Frank Tamietti—Check 7280.....	153.57
Pete Giago—Check 7281.....	122.86
	<hr/>
	\$706.42

AMERICAN SMELTING AND REFINING CO.

East Helena Plant, East Helena, Mont.

Ore Settlement Sheet.

Mine—Goldsmith.

Shipping Point—Butte.

Bought of Crystal Copper Company. Date Nov. 10th, 1921.

Assays Per Ton.

Percentage.

Gold—	.63 Ounces	for 95 Per Cent @ \$20.
Silver—	78.2 Ounces	for 100 Per Cent @ .991 $\frac{1}{4}$
Silver—	78.2 Ounces	5% treatment @ .991 $\frac{1}{4}$
Lead—Per Cent		for 90 Per Cent
Copper—Per Cent		for 100% Dry (Wet Less 1.3)
Insoluble—Per Cent		
Iron—Per Cent		
Manganese—Per Cent		
Lime—Per Cent		
Zinc—4.3 Per Cent		Over Per Cent 30¢
Sulphur—Per Cent		
Speiss—Per Cent		

Serial Number	Our Number	Car Number	Gross Weight	% Moisture	Number of Sacks
2573	2019	58277	113000	3.1	
	34.				Weight of Sacks.
	Mine No.				

Date of B/L.

Date of Arrival, Nov. 2d, 1921.

Quotations:

Silver, .99 $\frac{1}{4}$

Lead

Copper

AMERICAN SMELTING AND REFIN-
ING CO.

By M.

Keep this statement.

Checked by W. [147]

Prices.	Debit.	Credit.
Gold—Per Ounce		11.97
Silver—Per Ounce		77.61
Silver—Per Ounce	3.88	
Lead—Per cwt. Less ——— cts. per lb.		
Copper—Per lb. Less ——— cts. per lb.		
Insoluble—Per Unit		
Iron—Per Unit		
Manganese—Per Unit		
Lime—Per Unit		
Zinc—Per Unit	1.29	
Sulphur and Speiss. Treatment per ton	11.00	
	<hr/>	
Totals	16.17	89.58
	<hr/>	
Net value per ton.....		73.41

Net Weight.	Per Ton.	
109497	73.41	4019.09
Freight and War tax....	142.34	
Umpire Assay		
Additional freight and War tax on bullion to 90% of the lead @ \$6.35 per ton.		
Sampling		
Totals	142.34	4019.09

Net Proceeds3876.75

A charge of five dollars made for sampling on all lots of ore containing less than five tons. Rates subject to change without notice, except on contracts for specified time or specified tonnage. [148]

Notations on back of foregoing sheet:

Net Proceeds3876.75
 Royalty 34½%1337.48

Net from smelter.....2539.27
 Leasers—one-half1269.64

Checks drawn:

7396—Stock subscription \$125.00
 7397—Frank Tamietti 228.93
 7398—Batt Tamietti 228.93
 7399—John Pagliero 228.93
 7400—Lawrence Mansanti 228.93
 7401—Pete Giago 228.92

\$1269.64

Filed Dec. 15, 1924. C. R. Garlow, Clerk. [149]

(Testimony of Harrison E. Clement.)

The WITNESS.—I have no engineer reports on the territory surrounding the winze that is involved in this litigation, and have no assays from samples taken of ore from the territory involved that can be identified. I do not know of my own knowledge what the footwall lead in the territory involved in this action assays. I have settlement sheets from the smelter under date of February 25, 1922, car No. 2845, also settlement sheets from the smelter under date of March 21, 1922, car No. 1677, also date of April 11th, 1922, car No. 2069. I do not know where the ore came from that was shipped to the smelter and the returns that is reported or purported to be made in Plaintiff's Exhibit "Q"; don't know what portion of the mine. I have in my possession settlement sheet from the smelter under date of April 22, 1922, car No. 4,901; also May 10, 1922, car No. 1,461, and June 5th, 1922, car No. 2,791. Examining Plaintiff's Exhibit "R" for Identification, which purports to be smelter returns on ore shipped from the Goldsmith mine, I will say of my knowledge I don't know where the ore came from. The book which you show me containing 152 pages is the property of the Crystal Copper Company, the defendant. This book which you hand me, containing 152 pages, is also the property of the Crystal Copper Company, and at the present time it is used to enter the settlement sheets as they come in in detail. I cannot say that it was used for the same purpose during the years 1921 and 1922.

(Testimony of Harrison E. Clement.)

Q. Has there been any entry made of car purporting to have been shipped December 27th, 1921, car No. 58994, in the book?

Mr. WALKER.—If the Court please, we object to the introduction of this book in evidence unless it is shown by plaintiff's counsel that it is a book with the items entered therein [150] correctly, by whom the items were made, and if made in the course of business.

Mr. McCracken.—I haven't come to that yet.

Q. You may answer the question.

A. You mean as to whether there is an entry of those items under the date of September 27th, 1921, and I see car No. 58994.

Q. I have no way of knowing whether those entries were made in the due course of business or not. At the present time Thomas Tutty is our bookkeeper, but I don't know who was keeping the books during the years 1921 and 1922. The book is now kept in the regular course of business and is a record of the corporation, being the records of the local office. The book was there when I came there. I think the system of making the entries of the car numbers is different, but probably the information is entered from the settlements. We made and keep entries made under the date of September 27, 1921, October 17, October 27, November 10th, November 26th, December 9th, December 31st, January 31st, and March 4, 1922—we made a copy of the lines on the books under those dates, and figures on the lines, and also a copy of February 25th, 1922, March 21,

(Testimony of Harrison E. Clement.)

1922, and April 11, 1922, and April 27, 1922, May 10, 1922, and June 5, 1922. We also made some additions and subtractions on that entry. Plaintiff's proposed exhibit "S" is one of the copies we made on those entries.

I don't know whether the ore has been taken out on the hanging-wall side at the bottom of this winze up to the 500 foot level or not. I have been in that portion of the winze, that is the bottom of the winze has been timbered and it is partly caved, and it is impossible to get into the old stopes. [151] It was timbered up at the time I came to work there and caved in. We have maps of the levels but no stope maps; no maps showing what was stoped.

Witness excused. [152]

TESTIMONY OF FRANK TAMIETTI, FOR PLAINTIFFS.

FRANK TAMIETTI, one of the plaintiffs, called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination by Mr. McCracken.

The WITNESS.—My name is Frank Tamietti; I reside in Walkerville, Montana, and am a brother of Batt Tamietti, one of the plaintiffs. I am named as one of the plaintiffs in this action but have got nothing to do with the case. I was working in partnership with Batt Tamietti, Lawrence Monzetti, Pete Gaido and John Pagleero on the 15th of January, 1922, but not the 16th. I worked in the Gold-

(Testimony of Frank Tamietti.)

smith mine on and after January 15th, and in a winze something like about one thousand feet in a northwesterly direction from the No. 1 shaft on the 500 foot level, and took out some ore there from that winze and shipped it to the smelter. Having examined Plaintiff's Exhibit "Q," I will state I am the same party who is named on the back thereof as Frank Tamietti, in the return. That is the ore that was left there. After they left there was three cars and not any more. We shipped those three cars that was left on this old stope that we had the lease between.

Mr. McCracken.—We will offer exhibit "Q" in evidence. It shows the value was taken from the place after the lease was taken on the part of plaintiff.

Mr. Wagner.—We object as incompetent, irrelevant and immaterial for any purpose. May it please the Court, the testimony so far discloses that they were operating under a license and ^{not} got a lease, and therefore plaintiffs are not entitled to [153] recover for any ores thereafter shipped from the mine or any place in the mine.

Examination by the COURT.

The WITNESS.—This is supposed to be the ore taken out the return of shipments from this very same property worked by the plaintiffs, the very same ground that I worked, and I know that because I stayed there until I saw the last car of ore, John Pagleero and I.

The COURT.—The objection is overruled.

Mr. WAGNER.—Exception.

(Document received in evidence, marked Plaintiff's Exhibit "Q," and is as follows:) [154]

PLAINTIFFS' EXHIBIT "Q."

ANACONDA COPPER MINING CO.,

WASHOE SAMPLER.

Received from Crystal Copper Co.

Butte, Montana, February 25, 1922.

(Frank Tamietti)

Class—Gold and Silver.

Address—Butte, Montana.

Mine—Goldsmith.

Sampler No.	Weights Pounds Gross	Per Cent Water	Assays		
			Per Cent Electro- lytic Copper	Ounces Silver	Ounces Gold
29135	106620	2.7	—	55.0	0.44
Working Charge.	Price Per Ton.		Value.		Draft No.
Dollars.	Dollars.		Dollars.		
12.98	49.73		2579.52		
	N. P. Freight		13.33		
			<hr/>		
			2566.19		
W. A. Clark and Bro.—Roy- alty 23%			590.22		9361
			<hr/>		
			1957.97		9360

Car No.

BAP 2845.

Zn. Pb. Insol. Fe.

Quotation and Settlement Basis:

Copper	Silver	Gold	Zinc	Lead
	99 ⁵ / ₈	\$20.00		

Less 3¢.

%	100%	90%	%	%
ANACONDA COPPER MINING CO., WASHOE SAMPLER.				

By L. R. MARGETTS,
Superintendent. [155]

Notations on back of foregoing sheet:

Net from smelter.....	\$1975.91
Leasers—one-half	\$ 988.
Hospital Dues Six Persons Feb.	\$6.00
Industrial Accident Jan. 16th to Feb. 28,	
6 persons	23.40
Check 7694—Harry Daniels	75.50
Check 7755—Anton Carlevato—30 days—	
\$1.00	141.50
Check 7756—Sanz—23 days—\$1.00	108.25
	<hr/>
	\$354.65
Check 7757—E. H. Walker, Secy.	50.00
Check 7758—Pete Vidack	16.65
Check 7759—Ralph Paasch	16.65
Check 7760—John Veal	16.70
31½ ds. Check 7761—John Pagliero	\$166.95
—\$25 stock sb.	141.95
32 ds. Check 7762—Frank Tamietti	\$169.60
—\$25 stock sub.	144.60

29 ds. Check 7763—Coston Ponsetti	153.70
—\$25 Vidack contract.....	128.70
27 ds. Check 7764—Wm. Bullock	\$143.10
—\$25 Vidack contract.....	118.10
	\$988.00

[156]

ANACONDA COPPER MINING CO.,
WASHOE SAMPLER.

Butte, Montana, March 21, 1922.

Received from Crystal Copper Company.

(Frank Tamietti)

Address—Butte, Montana.

Mine—Goldsmith.

Class—Gold and Silver.

Sampler No.	Weights Pounds Gross	Per Cent Water	Pounds Dry	Per Cent Electro- lytic Copper	Assays Ounces Silver	Ounces Gold
29277	124280	1.4	122540	—	98.7	0.74

Working

Price

Charge.

Per Ton.

Value.

Draft No.

Dollars.

Dollars.

Dollars.

12.42

99.23

6079.82

N. P. Freight

15.54

6064.28

W. A. Clark & Bro. Roy-

alty 34½%

2092.18

9448

3972.10

9449

Car No.

BAP 1677

Zn. Pb. Insol. Fe.

Working charge \$7.50 plus 5% of silver value.

Quotation and Settlement Basis:

March 16, 1922.

Copper	Silver	Gold	Zinc	Lead
	99 $\frac{5}{8}$ ¢.	\$20.00		
Less 3¢.				
%	100%	90%	%	%

ANACONDA COPPER MINING CO.,
WASHOE SAMPLER.

By L. R. MARGETTS,
Superintendent. [157]

Notations on back of foregoing sheet:

Net returns from smelter.....	\$3972.10
Leasers—one-half	1986.05
Check 7845—John Waldie, loading car 2845, Feb. 15.....	\$6.50
Check 7846—Matt Sutter, loading car 2845, Feb. 15.....	6.50
Check 7896—Barry Murphy, loading car 1677	15.50
Check 7894—Antonio Carlevato, 24 d. @ 4.75	114.00
Check 7895—Joe Sanz, 17 d. @ 4.75.....	80.75
Check 7897—E. H. Walker, Secy., stock..	50.00
Check 7898—Pete Vidack	16.70
Check 7899—Ralph Paasch	16.65
Check 7900—John Veal	16.65
Check 7901—John Pagliero	424.45
Check 7902—Wm. Bullock	414.45
Check 7903—Caston Ponsetti	404.45
Check 7904—Frank Tamietti	419.45

\$1986.05

ANACONDA COPPER MINING CO.,
WASHOE SAMPLER.

Received from Crystal Copper Company.

Butte, Montana, April 11, 1922.

(Frank Tamietti)

Address—Butte, Montana.

Mine—Goldsmith.

Class—Gold and Silver.

Sampler No.	Weights		Pounds Dry	Per Cent Electro- lytic Copper	Assays	
	Pounds Gross	Per Cent Water			Ounces Silver	Ounces Gold
29384	93260	2.6	90835	—	73.7	0.52

Working

Price

Charge.

Per Ton.

Value.

Draft No.

Dollars.

Dollars.

Dollars.

14.84

67.94

3085.66

N. P. Ry. Freight

11.66

3074.00

W. A. Clark & Bro. Roy-

alty 34½%

1060.53

9516

2013.47

9517

Car No.

BAP 2069.

Zn. Pb. Insol. Fe.

Working charge \$7.50 plus 10% of silver value.

Quotation and Settlement Basis:

April 13, 1922.

Copper	Silver	Gold	Zinc	Lead
	995/8	\$20.00		

Less 3¢.

%

100%

90%

%

%

ANACONDA COPPER MINING CO.,
WASHOE SAMPLER.

By L. R. MARGETTS,

Superintendent. [159]

(Testimony of Frank Tamietti.)

The WITNESS.—Plaintiff's Exhibit "R" are settlement sheets from the smelter, and this is my name on the back. I got every cent of money which purports to be delivered to me on that. The ore shown on those sheets, settlement sheets, was taken from the stope and drift, where we finished one end to the other, a little block of ground that was left in the stope, and amounted to three cars, and was taken out between the bottom of the drift on the five hundred foot level.

Mr. McCracken.—We ask to introduce exhibit "R."

Mr. Wagner.—The same objection.

The COURT.—Let it be admitted.

(Paper received in evidence, marked Plaintiff's Exhibit "R," and is as follows:) [161]

PLAINTIFFS' EXHIBIT "R."

ANACONDA COPPER MINING CO.,
WASHOE SAMPLER.

Butte, Montana, April 27, 1922.

Received from Crystal Copper Company.

(Frank Tamietti)

Address—Butte, Montana.

Mine—Goldsmith.

Class—Gold and Silver.

Sampler No.	Weights Pounds Gross	Per Cent Water	Pounds Dry	Per Cent Electrolytic Copper	Assays Ounces Silver	Ounces Gold
29489	122760	3.0	119077	—	39.9	0.32

Working Charge.	Price Per Ton.	Value.	Draft No.
Dollars.	Dollars.	Dollars.	

11.18	31.34	1865.94	
N. P. Ry. Freight		15.35	
		<hr/>	
		1850.59	
W. A. Clark & Bro. Roy-			
alty 23%		425.64	9573
		<hr/>	
		1424.95	9574

Car No. BAP 1401.

Zn. Pb. Insol. Fe.

Working charge \$7.50 plus 10% of silver value.

Quotation and Settlement Basis:

April 21, 1922.

Copper	Silver	Gold	Zinc	Lead
	995/8	\$20.00		
Less 3¢ .				
%	100%	90%	%	%

ANACONDA COPPER MINING CO.,
WASHOE SAMPLER.

By L. R. MARGETTS,
Superintendent. [162]

Notations on back of foregoing sheet:

Net returns	1424.95
Leasers' one-half	712.48
	<hr/>
Hospital dues, 6 persons, April	6.00
Ind. Accident dues, 6 persons, April	15.60
Ch. 8073—Barry Murphy, loading car	6.50
Ch. 8074—W. R. Richards	6.50
Ch. 8075—Antonio Carlevato, 16 das. @ 4.75, \$84, less 2	82.00

Ch. 8076—Joe Sanz, 15½ das. @ 4.75, 81.65,	
less 2	79.65
Ch. 8077—Wm. Bullock, 32 shifts.....	129.05
Ch. 8078—John Pagliero, 31 shifts, \$125.05,	
less 2	123.05
Ch. 8079—Costan Ponsetti, 32 shifts,	
\$129.05, less 2.....	127.05
Ch. 8080—Frank Tamietti, 32 shifts, 129.07,	
less 2	127.07
Ch. 8081—Road tax, five persons.....	10.00
	\$712.47

[163]

ANACONDA COPPER MINING CO.,
WASHOE SAMPLER.

Butte, Montana, May 10, 1922.

Received from Crystal Copper Co.

(Frank Tamietti)

Address—Butte, Montana.

Mine—Goldsmith.

Class—Gold and Silver.

Sampler No.	Weights Pounds Gross	Per Cent Water	Pounds Dry	Per Cent Electrolytic Copper	Assays Ounces Silver	Ounces Gold
29604	121620	3.0	117971	—	25.4	0.20

Working

Price

Charge.

Per Ton.

Value.

Draft No.

10.03

18.87

1113.06

N. P. Ry. Freight

15.20

1097.86

W. A. Clark & Bro. Royalty 11½%

126.25

9621

971.61

9622

Car No.

BAP 1461.

Zn. Pb. Insol. Fe.

Working charge \$7.50 plus 10% of silver value.

Quotation and Settlement Basis:

May 5, 1922.

Copper	Silver	Gold	Zinc	Lead
	99 $\frac{5}{8}$	\$20.00		

Less 3¢

%	100%	90%	%	%
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ANACONDA COPPER MINING CO.,
WASHOE SAMPLER.

By L. R. MARGETTS,
Superintendent. [164]

Notations on back of foregoing sheet:

Net returns	\$971.61
Leasers' one-half	485.80
Ch. 8110—Barry Murphy loading.....	\$6.65
Ch. 8111—W. R. Richards loading.....	6.65
Ch. 8112—Antonio Carlevato, 10 days, @	
\$4.75	47.50
Ch. 8113—Joe Sanz, 10 days, @ \$4.75.....	47.50
Ch. 8114—Wm. Bullock, 14 days.....	91.85
Ch. 8115—John Pagliero, 15 days.....	96.90
Ch. 8116—Costan Ponsetti, 15 days.....	96.90
Ch. 8117—Frank Tamietti, 14 days.....	91.85
	<hr/>
	\$485.80

f165]

ANACONDA COPPER MINING CO.,
WASHOE SAMPLER.

Butte, Montana, June 5, 1922.

Received from Crystal Copper Co.

(Frank Tamietti)

Address—Butte, Montana.

Mine—Goldsmith.

Class—Gold and Silver.

Sampler No.	Weights		Pounds Dry	Per Cent Electro- lytic Copper	Assays	
	Pounds Gross	Per Cent Water			Ounces Silver	Ounces Gold
29769	128660	2.2	125829	—	34.8	0.26

Working Charge.	Price Per Ton.	Value.	Draft No.
Dollars.	Dollars.	Dollars.	
10.97	28.38	1785.51	
N. P. Freight		16.08	

1769.43

W. A. Clark & Bro. Roy- alty 23%	406.97	9715
	<hr/> 1362.46	9716

Car No. BAP. 2791.

Zn. Pb. Insol. Fe.

Working charge \$7.50 plus 10% of silver value.

Quotation and Settlement Basis:

May 26, 1922.

Copper	Silver	Gold	Zinc	Lead
	99 $\frac{5}{8}$	\$20.00		
Less 3¢				
%	100%	90%	%	%

ANACONDA COPPER MINING CO.,
WASHOE SAMPLER.

By L. R. MARGETTS,
Superintendent. [166]

(Testimony of Frank Tamietti,)

Notations on back of foregoing sheet:

Net proceeds	1362.46
Leasers' one-half	681.23
Hospital dues, 6 persons, May.....	\$6.00
Industrial Accident, 6 persons in May.....	15.60
8201—W. R. Richards, loading car.....	8.00
8202—Barry Murphy, loading car.....	8.00
8203—Antonio Carlevato, \$80.75, less \$1.00	79.75
8204—Joe Sanz, 18 ds., \$85.50, less \$1.00....	84.50
8205—Wm. Bullock, 26½.....	121.00
8206—John Pagliero, 26.....	118.70
8207—Caston Ponsetti, 26.....	118.70
8208—Frank Tamietti, 26½ days, less \$1.50	
for plank	119.50
Plank	1.50
	\$681.25

Filed Dec. 15, 1924. C. R. Garlow, Clerk. [167]

The WITNESS.—I worked the hanging-wall side of this vein up to the 500 foot level, and the ore ran partly in places right close to the winze, but it didn't run very far. If I had a map I could tell you; ran close to the track, ran up to the 500 foot level, or close to the winze for about 75 feet from the east; it didn't run exactly to the level, and we had to stop there because the ore was no good; no value in it.

Cross-examination by Mr. WALKER.

The WITNESS.—After January 16th, 1922, when Lawrence Monzetti, Pete Gaido and Batt

(Testimony of Frank Tamietti,)

Tamietti were stopped working there I and John Pagleero continued in the same ground, and took out all the ore that was left in that ground where we had a lease, three cars; there were three cars in that territory.

You can tell by the date of the smelter returns which of these three cars was the shipment of ore we took out on this particular ground. We never did take out any ore of any value on the east side of the fault, and the highest value we took out was on the old stope or what you call the old lease. On that ground my brother, Lawrence Monzetti, Pete Gaido, John Pagleero and I had prior to the 16th day of January, 1922, all the ground that we had under that contract or lease or agreement, whatever it was, there was only three cars left. John Pagleero and I, after January 16th, 1922, did development work or prospective work along the footwall in the particular ground that Batt Tamietti, my brother, John Pagleero, Pete Gaido, Lawrence Monzetti and I had prior to the 16th of January, 1922; we prospected the footwall in that particular ground. On the first forty-five feet from the winze Mr. Alderson came down and said for us boys to start and open up the footwall ore [168] that it was showing up on the level, for which we sunk our winze, and they were with us until the 15th or 16th, I don't know what you call it, the last day in January; and we went and tapped the lead and when we tapped the lead we found a little streak there that we did sample, and what we took

(Testimony of Frank Tamietti,)

out I know we didn't take out more than about a mine car, and after that they got through it, and, of course, after a while I will tell you why. They got through after and we keep going to work, and we want to go and raise. We went a little east, not very much from these raise or cross-cut or what you call it, about a set, and we went up a hole there but didn't have any value. Well, Mr. Alderson comes down and he says, "I am not satisfied with all of this," he says, "we got to make it sure," he says, "if we will leave any more ore on the footwall." He says, "You boys," he says, "you got to start another cross-cut a little over east and develop this place and find out if there is any more ore left here." We decided to come over to the end of our drift where the fault cut off the both lead, and we went in a few feet, but they were not with us any more, and we drive this cross-cut in about forty feet; the lead was running more close over to the hanging-wall lead, we didn't have to go so far, and after that we drive from east, we drive, drift to west, and meet the other cross-cut where we tapped a lead of ore; the ore no good, didn't sample more than three or four ounces or six the most; we raised until we went to the level and the ore was no good there; didn't have no value in it, that is what I mean.

We did not ship any ore from the footwall; never shipped a car except what I told you in the cross-cut where we took out about a mine car, and that is all that was there. All the ore that was left in

(Testimony of Frank Tamietti.)

the ground that plaintiffs have been talking [169] about in the hanging-wall. we only shipped three cars. All the ore that was left in that ground that I and John Pagleero and Batt Tamietti and Lawrence Monzetti and Pete Gaido had this working agreement on which was terminated on the 16th of January, was three cars, in that block of ground. After we took the three carloads out there wasn't a pound of ore left there.

I did not consult with Mr. Tyvand or McCracken about being a party to this suit. I did not confer or consult with Messrs. Tyvand and McCracken or with the plaintiffs Lawrence Monzetti, Pete Gaido or Batt Tamietti, about this case. They came to me and wanted me to sign and go with them, and fight the case, but I said I would have nothing to do with it. I said the Crystal Copper Company, the manager, treated me good, and I have got nothing to say against it. I said, "If you want to fight it go ahead and do it yourself." We got fifty feet more ground than we asked for. I received all the stock and settled for all the stock I agreed to take.

Witness excused.

Mr. McCracken.—If the Court please, that is our case in chief. [170]

TESTIMONY OF FRANK TAMIETTI, FOR
DEFENDANT.

FRANK TAMIETTI, one of the plaintiffs, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination by Mr. WAGNER.

Q. Mr. Tamietti, are you a party to this action?

Mr. TYVAND.—If the Court please, I object to that as being incompetent, irrelevant and immaterial, and asking for the conclusion of the witness.

The COURT.—Well, I think that has already been brought out, Mr. Wagner. Mr. Walker developed all of that feature of the case on cross-examination. The witness said he had nothing to do with it, as I understand it.

The WITNESS.—I have no interest in this litigation. I said I didn't have anything to do with it. I signed everything. I got the last check and the check will show, and if you sign the check that will show you are satisfied, and you haven't got any comeback. I got all the money that is coming to me. I have not got any stock coming from the Crystal Copper Company, but wish I had some coming.

Witness excused. [171]

TESTIMONY OF JOHN PAGLEERO, FOR
DEFENDANT.

JOHN PAGLEERO, called as a witness on behalf of defendant, being duly sworn, testified as follows:

Direct Examination by Mr. WALKER.

The WITNESS.—My name is John Pagleero. I was originally from the 26th day of June, 1921, up until the 16th day of January, 1922, engaged in working in the Goldsmith Mine with Lawrence Monzetti, Pete Gaido, Bat Tamietti and Frank Tamietti, and am familiar with the ground in which we were operating; know the winze, the stopes and everything. After the lease, or agreement or contract, whatever it was, was terminated on the 16th of January, 1922, I and Frank Tamietti continued working there in the same ground. After they got through, I think it was three cars of ore that we took out on this side of the fault and four on the other; but am not sure, didn't keep track of that. I think it was three railroad cars that we took out of the particular ground they were working in. We took all the ore we could find that was left there after they had gone,—that we could find in the hanging-wall. There was some low grade, but nothing of value. We did some development work on the footwall in that ground. We drove a cross-cut on the footwall and then we drove a little drift in the footwall and drove up a couple of raises and couldn't find anything; there

(Testimony of John Pagleero.)

was lots of low grade but no value from the assay. We made no shipment from the footwall of any ores. I think we had about seven or eight hundred pounds. In the first cross-cut we found a little pocket, not quite a mining car, a few powder boxes full. [172]

After the arrangement between myself, Frank Tamietti, Bat Tamietti, Pete Gaido and Lawrence Monzetti was terminated on the 16th of January, 1922, I received a settlement in full for my stock and my money from the Crystal Copper Company. I have no interest in this case now.

The character of the ground in the footwall was pockety, irregular, sometimes good and sometimes bad.

Cross-examination by Mr. McCRACKEN.

The WITNESS.—Between the 26th day of June, 1921, and the 16th day of January, 1922, I and Frank Tamietti, Bat Tamietti, Lawrence Monzetti and Pete Gaido were partners in a lease in the Goldsmith mine, and we continued to work as partners during all of that time. When we were stopped and took out three cars beyond the fault, that was all in the same lead; it was all taken right there in the same place.

Witness excused.

Mr. WALKER.—We have nothing further.

Mr. McCRACKEN.—We would like to cross-examine Lawrence Monzetti further. [173]

TESTIMONY OF LAWRENCE MONZETTI,
FOR DEFENDANT (RECALLED—CROSS-
EXAMINATION).

LAWRENCE MONZETTI, a witness heretofore on the stand, recalled for further cross-examination, testified as follows:

(Cross-examination by Mr. McCRACKEN.

The WITNESS.—I testified before in this case. At the time I signed Defendant's Exhibit "K" I was on the street, coming from work; had been working at the Mountain Con Mine, and this was about five o'clock at night; was just coming off shift; had been working during the day in a gassy place, and was sick at the time with gas. At the time I signed that Mr. Alderson did not ask me to dismiss the suit which was pending; didn't say anything about the suit then pending. I didn't read the instrument before signing it. He did not pay me any money other than what I already had coming for ores shipped before I signed the instrument; just paid what I already had coming. He did not give me any stock other than what I already had paid for before I signed the instrument. Exhibit "N" was signed at the same time exhibit "K" was signed; both signed the same time. In signing exhibit "K" the defendant nor Mr. Alderson gave me anything other than what I had coming at the time I signed them, that is what I had coming for ore already shipped, and stock I had already paid for. He did not make

(Testimony of Lawrence Monzetti.)

any explanation to me that it would be a release to the company on the suit then pending; he said nothing about a suit then pending.

Q. I hand you Defendant's Exhibits "M," "L," "J." State when you received those several checks represented by the exhibits just mentioned.

A. This one I received the same time when I signed the paper. [174]

Q. And the check represented by exhibit "J" and exhibit "L"?

A. It was over at my house.

Q. When you have reference to the papers you have reference to Defendant's Exhibit "K" and Defendant's Exhibit "N." You received "L" and exhibit "J" at the same time you signed exhibit "N," Defendant's Exhibit "N" and Defendant's Exhibit "K"?

A. Yes, sir, I got it the same time. Exhibit "L" represents \$11.43 I had coming for a car which I already shipped. Exhibit "J" represents a check for stock which I sold to Mr. Alderson at the same time which I already had coming. Exhibit "M" I received on or about the 1st of February for ore I had shipped.

I don't read or write the English language very much. I cannot read exhibit "K"; couldn't read it; couldn't read Defendant's Exhibit "N."

Redirect Examination by Mr. WALKER.

The WITNESS.—Check marked Defendant's Exhibit "J" is payable to me for a hundred dollars, and that was for stock I sold Mr. Alderson.

(Testimony of Lawrence Monzetti.)

He did not explain it to me; just asked me if I wanted to sell my stock and I said yes. That was the two hundred shares of stock I had coming. That is my signature on the back of it. I was not suffering from gas when I signed that and got the money on it.

Defendant's Exhibit "M," a check dated February 1st, 1922, payable to Lawrence Monzetti for \$80.85, was for ore that we shipped, after we were put out of the mine. I signed that; this is my signature. My head was not bad from gas when I took the money on that. I knew what it was about. Defendant's Exhibit "L," a check dated March 4, 1923, made payable to Lawrence [175] Monzetti, in the sum of \$11.43, and signed by me on the back. I had an attack of gas when I got the money on that, and the gas affected my head. I know I got the money because it was coming to me; I was sick. This is my signature there. Mr. Alderson did not tell me what that was; he told me to sign this paper. I thought I sold him a share. This is a receipt for 100 shares of stock. I signed for him 200 shares of stock. I did not know what I signed when I signed for the stock. I had it coming. I met him and he told me to sign here, and get your money and I signed it and he didn't explain anything about it. I did not know all about the stock. I knew I had it coming and I took it, and signed a receipt for it. I knew I was signing that I sold the stock.

Q. And you were not suffering from gas; your

(Testimony of Lawrence Monzetti.)

brain was working because you knew and had thought about what you were doing, didn't you?

A. Yes, sir.

Witness excused. [176]

Mr. McCracken.—If the Court please, plaintiffs move the Court to strike from the evidence Defendant's Exhibit "J," upon the grounds and for the reasons that the same is irrelevant and immaterial, that no consideration has been shown for the same, as Monzetti received nothing more than that which he had coming at that time, furthermore the signature was obtained at a time Monzetti was incompetent to act and did not know what he was doing, furthermore he was unable to read or write, also it does not prove or tend to prove any of the issues in this case as no release was plead in the answer.

The COURT.—The motion will be denied.

Exception.

Mr. McCracken.—Plaintiffs make the same motion as to Defendant's Exhibit "K" as was made to exhibit "J."

The COURT.—Let the record show the same motion as to Defendant's Exhibit "K" and that the motion is denied.

Exception.

Mr. McCracken.—Plaintiffs make the same motion as to Defendant's Exhibit "M" as was made to exhibits "J" and "K."

The COURT.—Let the record show the same

(Testimony of Lawrence Monzetti.)

motion as to Defendant's Exhibit "L" and that the motion is denied.

Exception.

Mr. McCracken.—Plaintiffs make the same motion as to Defendant's Exhibit "M" as was made to exhibits "J," "K" and "L."

The COURT.—Let the record show the same motion as to Defendant's Exhibit "M" and that the motion is denied.

Exception.

Mr. McCracken.—Plaintiffs make the same motion as to Defendant's Exhibit "N" as was made to exhibits "J," "K," "L" and "M."

The COURT.—Let the record show the same motion as to Defendant's Exhibit "N" and that the motion is denied.

Exception.

TESTIMONY OF BATT TAMIETTI, FOR
PLAINTIFFS (RECALLED IN REBUT-
TAL).

BATT TAMIETTI, one of the plaintiffs, called to the stand in rebuttal, testified as follows:

Direct Examination by Mr. McCracken.

The WITNESS.—I am the same witness who was on the stand yesterday. There has been no settlement between myself, Frank Tamietti, John Pagleero, Lawrence Monzetti, and Pete Gaido of the partnership affairs since January 16, 1922; no accounting. Neither Frank Tamietti, John Pag-

(Testimony of Batt Tamietti.)

leero, or the Crystal Company has paid me any money due and owing me since January 16th, 1922.

Witness excused.

Mr. McCracken.—That is all.

Mr. Wagner.—Comes now the defendant and moves the Court to direct a verdict in favor of the defendant and against the plaintiffs Pete Gaido, John Pagleero and Frank Tamietti, three of the plaintiffs named in this action, on the ground and for the reason that the evidence affirmatively discloses that they have no interest in this litigation but have settled in full with the Crystal Copper Company.

The defendant now moves the Court to direct a verdict in favor of the defendant and against all of the plaintiffs on the grounds and reasons following:

First: There is a fatal variance between the allegations and the proof in this, that plaintiffs rely for a recovery upon the proposition as alleged in their complaint that the plaintiffs were and are a mining copartnership, engaged in mine subleasing and subletting from the defendant Crystal [177] Copper Company, whereas the proof affirmatively shows and discloses that the relationship of mining partners does not and never did exist between these parties in so far as their negotiations and work for the defendant was concerned, but that the proof affirmatively discloses that they were operating and working under a license and not a lease, and that their relationship was nothing more than that of a working agreement for a share of the profits.

There is a fatal variance because the parties Lawrence Monzetti and Batt—the plaintiffs Pete Gaido and Batt Tamietti, if they have any cause of action at all against the defendant it would be as individuals for work, labor and services performed.

Next: That the evidence is insufficient in law to prove a mining copartnership between the plaintiffs in their relations with the defendant in this case. The evidence is insufficient to prove a lease between the plaintiffs and the defendants, and the evidence establishes if it establishes any contractual relationship at all, a contract embodying a license. The evidence is insufficient to establish a lease for the reason that a lease of the real property of a mining corporation may only be secured by compliance with the provisions of Section 6004 of the Revised Codes of Montana, 1921, which requires affirmative approval of the stockholders and the board of directors.

Next: The evidence is insufficient to warrant a recovery by the plaintiffs or any of them, upon the theory that they are a mining copartnership because under the express provisions of Section 8059 of the Revised Codes of Montana of 1921, the acts and deeds and things of a majority of the members of such [178] partnership controls all acts of the partnership, and it affirmatively appears in this case that a majority of the members of the so-called partnership have no interest in this litigation, and the same may not be maintained by a minority of the members.

Next: The evidence is wholly insufficient to prove any damages sustained by the plaintiffs or any of them in the event the Court should hold that they were operating under a lease and not a license for the reason that the evidence pertaining to proof of prospective profits or damages by reason of the cancellation of the lease falls short of giving to the jury any tangible basis upon which to base any rational judgment as to damages, but that it would require speculation and conjecture to reach any verdict, and the same would be the result of mere guesswork having no foundation in the evidence in this case, particularly for the reason that there is no evidence showing or tending to show how long it would have required the plaintiffs to mine the ore in place which they contend they were deprived of mining, nor the cost of mining such ore nor the incidental expenses, or work or labor necessary to prepare the ore for shipment, nor is there any evidence in this case showing what the ore if mined could have been smelted for, nor what proportion of the net profits of such ore proportionate of the net profits in dollars would accrue to the plaintiffs. There is no evidence before the Court showing what the market price of the metals contained in the ore and from which the plaintiffs would derive net proceeds was or would be.

Further, the contract contended for by the plaintiffs as alleged in their complaint is one void under the statute of frauds of the State of Montana, and the proof in this case [179] discloses that the contract contended for in the complaint is not a lease but a working contract or license.

These matters being directed to the first count.

Upon the second count we urge all of these matters and in addition that plaintiffs may not recover under the second count under any theory of the case for the reason that it affirmatively appears from the evidence in this case that any stock transaction or transactions for the capital stock of the Crystal Copper Company were had with Matt W. Alderson as an individual and not as a representative of the defendant company, and for the further reason that there is no evidence in this case to prove any damages which plaintiffs sustained or might have sustained by reason of nondelivery of any stock to them to be earned in the future. That the measure of damages for breach of an agreement to sell personal property not paid for is fixed by statute, particularly sections 8674 and 8700 of the Revised Codes of Montana of 1921. There is no evidence to show the measure of damages as fixed by these sections of the code, in that the evidence fails to disclose that the value of the property of the stock in question was the market price thereof and the price at which it might have been bought or its equivalent bought in the market nearest to the place where the stock should have been delivered or would have been delivered and put into the possession of the plaintiffs if entitled thereto at all at such time after the breach of duty upon which plaintiffs' rights or the rights of any of the plaintiffs to damages accrued or within such time as would suffice with reasonable diligence for them to have purchased the stock at the nearest or in the open market. [180]

As directed to all of the evidence and to both counts of the complaint, the evidence wholly fails to show any measure of damage in that it fails to disclose the cost of removing the ore the plaintiffs claim they were deprived of mining or the number of men it would have been necessary to employ to remove it or how many of the partners or alleged partners, or the labor of how many of the partners or alleged partners would be required to remove it or the cost of the mining, would have been.

And for the further reason that the evidence wholly fails to disclose that the partnership as a mining partnership or otherwise, collectively or individually was ready, willing and able to perform its part of the contract alleged or would have performed it as a mining partnership or as individuals had they not been interrupted by the acts of the agent of the company.

The COURT.—The motion of the defendant is granted as to the second count in the complaint, and the jury will be instructed to find for the defendant on the second count.

As to the first count, the motion is denied.

Mr. WALKER.—Note an exception to the ruling of the Court.

Mr. TYVAND.—We ask for an exception. [181]

The foregoing is all of the testimony and evidence introduced upon the trial of said cause, and thereafter, and after arguments of counsel, the jury were by the Court instructed as follows:

INSTRUCTIONS OF COURT TO THE JURY.

The COURT.—Gentlemen of the Jury: We now come to the close of this case, at least nearly so. You have heard the evidence and the arguments of counsel, and again, as heretofore, it becomes the duty of the Court to deliver its instructions, and those, as you know, relate more especially to the law than the facts, although sometimes in the Federal Court the Judge comments on the facts; however that may be, you are the sole judges of the facts, and whatever comments the Court might make so far as the facts are concerned, you are at liberty to disregard, if you see fit to do so, unless you should find something therein that might be of some assistance to you in arriving at your verdict. However, when it comes to the law, you accept the law from the Court. The Court might sometimes be in error, but, if so, a record is made of it and if either side wants to consider any error that may be committed they will have an opportunity to do so elsewhere to right the wrong. You accept the rules of law applicable to the case as laid down by the Court.

Now, gentlemen, in this case, which is a civil case, as you know, pleadings have been filed, complaint, answer and reply. [182] These pleadings, as in other cases, you will understand, are not to be accepted by you as any evidence whatsoever in the case. The complaint states the cause of action against the defendant; the defendant comes in and makes an answer, denying and setting up affirmative relief or otherwise, as the case may be. Now,

in this case you understand what is contended for; you understand what the controversy is about, and the Court at the beginning will give you a brief statement in concise terms.

Plaintiffs claim that they were wrongfully ousted and ejected from the enjoyment of mining privileges which they had acquired from the Crystal Copper Company, a foreign corporation, doing business in Silver Bow County, through the agency of one Alderson, in charge of and operating the Goldsmith mine, located north of Walkerville in said county, and which was being operated by the defendant under lease from the owners at the times alleged in the complaint. It is admitted that Alderson was the general manager and superintendent of the defendant company; at the times alleged plaintiffs claim that they were and at the times mentioned in the complaint were mining copartners in mines, subleasing from the defendant, and it is as mining copartnership recovery for the breach of contract is sought. Plaintiffs claim they entered into an oral lease with the defendant for a portion of the Goldsmith mine below the 500 foot level, along the course of the lead, within the end lines of the mine. It is alleged that the lease was a grant with exclusive right to possession of that portion of the lead covered in the alleged contract or lease under the alleged grant. The plaintiffs claim that they were given exclusive right to mine and remove any and all ores in the territory [183] referred to; that the defendant was to furnish the explosives, the tools, and timbers required for the operation and

to hoist and lower the plaintiffs, and the ores they might furnish; and all ores shipped by the plaintiffs under their alleged sublease they were to receive a portion of the net proceeds from the smelter returns after deductions for shipping charges and certain royalties were paid. Plaintiffs claim that under the lease they entered into the mine and performed certain work and labor and mined ores which they shipped and payment therefor made to them. It is contended that from the 26th day of June, 1921, until the 16th day of January, 1922, the plaintiffs worked continuously under their sublease, and on the latter date finally arbitrarily were ejected from the property without cause, and from then on the defendant arbitrarily refused to permit the plaintiffs without cause to go on with the alleged sublease and arbitrarily canceled and rescinded same without cause, and that plaintiffs were able, ready and willing to go on with the lease had they been permitted to do so by the defendant. It is claimed that there were certain ore bodies covered by the lease which plaintiffs were prevented from mining, and would have mined under the terms of their alleged lease had they been permitted so to do; it is contended that they would have realized certain profits had the lease not been canceled. It is for the recovery of the alleged prospective profits the first cause of action contemplates. All the foregoing contentions of plaintiffs are put in issue by the denials in defendant's answer. Now, in order to get at the very meat of the controversy, I will read to you commencing with the 14th paragraph

of plaintiffs' complaint, in order that you may have in mind the exact allegations [184] as to damages: "That there were about one thousand tons of ore averaging seventy ounces of silver per ton, and eleven dollars in gold per ton, or of the value of \$81.00 per ton in the vein of ore on the hanging-wall side of said lead between the bottom of said winze and the 500 foot level of said mine, and the east and west line of said mine, yet to be mined on said date, January 16, 1922, that could and would have been mined by said plaintiffs and lessees within thirty days from and after the said 16th day of January, 1922, if the said defendant had not interfered with the said plaintiffs and lessees and arbitrarily canceled and rescinded the said sublease without cause, that the said plaintiffs and lessees were and are entitled to under said lease to mine and ship to the smelter under the terms, conditions and royalties of the aforesaid sublease, and that these plaintiffs would have realized on said ore a net profit to themselves of \$16.67 per ton, and that there were approximately one thousand tons of ore to be mined in the footwall of said lead between the bottom of said winze and the 500 foot level of said mine and the east and west lines of said mine, which could and would have been mined by said plaintiffs and lessees within a period of ninety days from and after the 16th day of January, 1922, if the said defendant had not interfered with said lessees and arbitrarily canceled and rescinded the said sublease without cause as aforesaid; that said plaintiffs and lessees were and are entitled under said sublease

to mine and ship to the smelter under the terms, conditions and royalties of the aforesaid sublease, which would have averaged about thirty-seven ounces of silver per ton and about seven dollars in gold per ton, or of the value of forty-two dollars per ton for said [185] ore, which said lessees could have mined at a net profit of \$12.50 per ton to said plaintiffs under the terms and conditions of said sublease. That by reason of the said arbitrary cancellation and rescission of said sublease without cause and the arbitrary ejection of the said plaintiffs, Lawrence Monzetti, Pete Gaido, and Batt Tamietti from said property by the defendant, without cause as aforesaid, and the arbitrary refusal of the defendant to permit the plaintiffs to go on with said sublease and enter in and upon the said property as aforesaid, without cause, the plaintiffs have been damaged in the sum of \$22,166.67 cents, no part of which has been paid; that the cancellation of said sublease and the ejection of the said plaintiffs, Lawrence Monzetti, Pete Gaido and Batt Tamietti from said property and the refusal as aforesaid of said defendant to permit plaintiffs to go on with said sublease was arbitrary on the part of said defendant and without cause. Wherefore plaintiffs demand judgment for the said amount."

Now, that will probably amount to a sufficient statement of what is before you for consideration. You will remember, gentlemen, that this case is different from a criminal case, where proof must be beyond reasonable doubt. In a case of this

kind, a civil case, suit for damages, you must be satisfied by proof which amounts to a preponderance of the evidence, as will hereafter be defined. A preponderance, meaning the greater weight of the testimony, for illustration, if for instance in your deliberations you come to a point where you feel that the evidence is about equally divided, if you are unable to determine, in such an instance there would be no [186] preponderance of the evidence, and you would be obliged to find for the defendant.

Now, in this case, as in other cases, you are the sole judges of the credibility of witnesses and the weight to be given testimony. You have an opportunity to see the witness upon the stand, you note his demeanor, his manner of giving testimony, you note whether he is frank and fair and candid, or whether he is evasive, whether he speaks in monosyllables, whether he appears to have any prejudice in the matter; you note what interest, if any, the witness has in the outcome of the case; you take into consideration all of these matters. A witness is presumed to speak the truth, but this presumption may be repelled by his manner of giving testimony, by evidence affecting his credibility, or by contradictory evidence, and you are the sole judges in that respect. If you believe that any witness wilfully testified falsely, on any material matter, you may reject his entire testimony unless you should find in some part corroboration in other testimony, or in any circumstance that may have developed during the trial of the case.

That is for you to say. You don't have to believe a witness simply because he tells you that a certain state of facts exists. What he says must appeal to your good judgment, your good common sense, in the light of all the other testimony and all the other circumstances in the case.

The court instructs the jury that if either party violated the contract, or failed to carry out or perform the conditions therein stated, then the other party would have a right of action for damages based on the breach of the contract. You are not bound to decide in conformity with the declarations of any number of witnesses who do not produce conviction in your [187] minds against a less number, or against a presumption, or other evidence satisfying your mind. That a witness false in one part of his testimony is to be distrusted in others. That the evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and therefore if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory was within the power of the party, the evidence offered would be viewed with distrust.

The Court instructs the jury that while the plaintiffs must prove their case by a preponderance of evidence, still the proof need not be direct evidence of persons who saw the occurrence sought to be proved, the facts may also be proved by circumstantial evidence, that is, by proof of circum-

stances, if any, such as could rise to a reasonable inference in the minds of the jury of the truth of the facts alleged and sought to be proved, provided such circumstances, together with all the evidence in the case constitutes a preponderance of the evidence. The Court instructs the jury by a preponderance of evidence is meant the greater weight. Preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a certain fact or state of facts. In determining upon which side the preponderance of evidence is, the jury should take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testify; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the result of the suit; the probability or improbability of the truth of their several [188] statements, in view of all the other evidence, facts and circumstances proved on the trial, and from all these circumstances determine upon which side is the weight or preponderance of the evidence.

You are instructed that for the breach of an obligation arising from contract the measure of damages is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby or which in the ordinary course of business would be likely to result therefrom.

The Court further instructs the jury that if plaintiffs entered into a verbal lease and expended labor and time and took out ore and exposed other ore which they might have taken out, and were

then wrongfully dispossessed by the defendant, and part of the ore which they had mined was appropriated by the defendant, and they were prevented from extracting any more ore, then they were entitled to recover the portion which according to the contract would belong to plaintiffs of the ore which they had actually mined, and any damages which they might have sustained by reason of the termination of the lease before all the ores discovered had been mined and sold, providing plaintiffs were willing, ready and able so to perform their agreement. If you find from the evidence that the plaintiffs were able, willing and ready to mine certain ores that the defendant is alleged to have leased to plaintiffs, and that the defendant has prevented plaintiffs from mining said ores, the measure of damages to plaintiffs is the value of the ores that the plaintiffs have been prevented from mining, less the cost of mining, shipping and smelting the same, less the royalties from the net smelter returns [189] less the defendant's one-half of the net balance. In this action the plaintiffs seek recovery from the defendant upon the proposition that they secured from the defendant a grant in the shape of a mining lease, with the right and privilege of mining and extracting ores from the Goldsmith mine, located in Silver Bow County, Montana, and that after securing this lease and performing some work, labor and services thereunder the defendant through its general manager, one Matt W. Alderson, rescinded the contract and ousted the *defendant* from the property, whereby they were dam-

aged; that the damage consisted of loss of prospective profits, and in this connection the Court charges you that no damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin.

In this case the defendant admits that there is due, owing and unpaid to the plaintiff, Batt Tamietti, the sum of \$11.43, and to the plaintiff, Pete Gaido a like amount, and the defendant, prior to the beginning of the trial herein has deposited the said sums, with accrued interest to date, amounting in all to \$28.00, which deposit was made to the Clerk of this Court, and said sum is now in his hands for the use of the said plaintiffs, and has been by them refused; further than this the defendant denies liability to the plaintiffs, either as a partnership or individually; therefore, if you find from the evidence that the sum so deposited is an amount sufficient to cover all the plaintiffs may have coming to them from the defendant, you will return a verdict in this case in favor of the defendant and against the plaintiffs. [190]

In this case you are instructed that the plaintiffs seek recovery upon the proposition that they are a mining copartnership, and in this connection you are instructed that the plaintiffs, Frank Tamietti and John Pagleero have admitted that full settlement has been made to them, and that they have no claim in this litigation against the defendant; and you are further instructed that it is disclosed by the evidence in this case that the plaintiff, Lawrence Monzetti, was paid in full for all services performed

by him under the contract sued upon, and that he signed a release which is in evidence in this case, whereby he admitted full settlement had been received by him for and on account of any interest he may have had in the contract sued upon; hence, the three plaintiffs named are not entitled to recover anything against the defendant, and the sole remaining question for your consideration is whether, under the facts and the law as given to you by the Court the remaining plaintiffs, Pete Gaido and Batt Tamietti, are entitled to recover anything at all against the defendant, as copartners, each entitled to a one-fifth interest in the profits of the copartnership, unless in the case of the partner, Lawrence Monzetti, you believe he was unconscious at the time of signing the release and incapable of realizing the nature and consequence to himself of his act. The evidence in this case submitted by the plaintiffs disclose that three cars and no more of commercial ore was mined and shipped from the hanging-wall from the territory claimed by the plaintiffs under their alleged contract, and in this connection the Court instructs you that the plaintiffs would be entitled to recover damages, if at all, on the three cars of commercial ore so mined and shipped, only upon the net profits that would accrue to them [191] after deducting all expenses incident to mining the same, and the burden of proof rests upon the plaintiffs to prove by a preponderance of the evidence that the said ore could and would have been mined by them not at a loss, but at a profit to themselves, and if it

could and would have been mined at a profit, then the plaintiffs would be entitled to recover only two-fifths of such profits after deducting the cost of mining as indicated, unless you should find in the instance of Lawrence Monzetti, the condition mentioned at the conclusion of the last instruction as to whether he was conscious or unconscious at the time of signing the release in full.

The Court instructs you that in ascertaining whether or not the plaintiffs or any of them were damaged by breach of contract alleged, that no damages may be awarded which are not clearly ascertainable in both their nature and origin, that nothing may be left to speculation and conjecture, and the burden of proof in this case rests upon the plaintiffs to prove by a preponderance of all of the evidence that any ores which they were deprived of mining and would have mined had the contract not been rescinded could and would have been mined at a profit to them, and it is only for such profit that plaintiffs may recover; therefore, if you believe from the evidence that the plaintiffs have failed to establish whether any ores they may have been entitled to mine could have been mined at a profit to themselves or a substantial amount of such profit, then your verdict must be for the defendant.

If you find from a preponderance of the evidence that the agreement or lease was made as alleged, and that the defendant ousted plaintiffs from possession, as alleged, and that plaintiffs [192] had they continued under their lease, being willing and able so to continue, would have mined the ground at

a profit, you are instructed to find for plaintiffs in some amount; in other words, if you so find, plaintiffs would be entitled to at least nominal damages.

As provided by Section 8667 of the Montana Codes, for the breach of an obligation arising from contract the measure of damages except as otherwise expressly provided for in this Code is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom. And again, in Section 8668 of the same codes, damages must be certain. No damages can be recovered for breach of contract which are not clearly ascertainable in both their nature and their origin. The Supreme Court of this state holds it is elementary that competent evidence must be produced of all facts necessary to a recovery upon which the jury can base a reasonably reliable conclusion; nothing can be left to mere conjecture; actual damages only may accrue. Those that are speculative, remote, uncertain, may not form the basis of a lawful judgment. Actual damages which will sustain a judgment must be established not by conjectures or unwarranted estimates of witnesses, but by facts upon which their existence is logically or likely inferred. Speculations, if any, because of estimates of witnesses are not a proper basis of recovery.

The jury are instructed to find for the defendant on the second count of the complaint, there being but slight evidence and that only by way of inference to sustain it, while opposed to it is the posi-

tive evidence uncontradicted that the sales [193] of stock of the defendant company was an individual transaction of Matt W. Alderson with plaintiffs, of personal shares belonging to himself.

Now, gentlemen, you have heard a very thorough discussion of the facts in this case, on both sides. It does not seem necessary at this time for the Court to recount those facts as discussed to you by counsel. You have heard the evidence. You have heard the claims of plaintiffs and the witnesses in the case, and the defense interposed on the other side, of how the work was performed in this mine and what was left. The Court will give you the exhibits that were introduced in evidence, and it is for you to determine, if you can, what amount of damages the plaintiffs are entitled to recover in this action, taking into account the claims of plaintiffs and the denials on the part of the defense, and as the Court has instructed you, you must find by a preponderance of evidence in order to find a verdict for the plaintiff. The Court has further instructed you as to the damages and how they must be ascertained, and that they must not be left to conjecture or speculation. That they must be certain of ascertainment.

It takes twelve of your number to agree on any verdict. You will select one of your number to act as foreman and he will sign your verdict when you agree. The Court will furnish you with the pleadings in the case, with forms of verdict, and the exhibits, and you will now retire to deliberate.

Any exceptions?

Mr. WALKER.—If the Court please, to the charge to the jury of the Court, counsel for the defense on behalf of the defense, [194] asks for a general exception and asks for a general and special exception for the failure of the Court to charge that the contract sued upon was a working agreement to be paid for by a share of the profits of the venture for which plaintiffs have already been paid. Second, that the Court erred in failure to charge that under the evidence plaintiffs are limited to recover, if at all, only nominal damages. Third, for the failure of the Court to instruct the jury to return a verdict in favor of the defendant and against the plaintiffs. For the further reason the Court erred in failure to instruct the jury that the contract between the parties, plaintiffs and defendant, was a license revocable at will, instead of a lease of ground for royalty. [195]

REQUESTED INSTRUCTIONS BY DEFENDANT.

Prior to delivering its charge and instructions to the jury the defendant, in writing, requested the Court to instruct the jury upon matters of law as follows, which requests were each and all refused by the Court and defendant's exception noted.

Gentlemen of the Jury:

In this case the plaintiffs claim that they entered into a contract or lease with the defendant corporation, Crystal Copper Company, whereby they were granted the exclusive right to mine certain territory embraced within the Goldsmith Mine located

in Silver Bow County, Montana. In this connection you are instructed that the contract sued upon is in all essential features a contract for labor to be performed and to be paid for by a share of the profits realized from such labor, and in this case it appears that the plaintiffs have been paid for all of the labor performed by them under said contract from the profits realized from the ores mined by them, save and except the sum of \$11.43 due, owing and unpaid to the plaintiff Pete Gaido and a like sum to the plaintiff, Batt Tamietti, but these sums with accrued interest have been paid to the clerk of this court for the use of the said plaintiffs prior to the beginning of this trial; therefore, your verdict will be against the plaintiffs and in favor of the defendants.

NOT GIVEN.

(Signed) C. N. PRAY,
Judge.

Gentlemen of the Jury:

In this case if you find for the plaintiffs the Court instructs you that you may find for them no more than nominal damages which would include the \$28.00 deposited with the Clerk of the Court in this case for the use and benefit of the plaintiffs, Batt Tamietti and Pete Gaido, together with such additional nominal sum as to you may seem just and meet in the [196] premises.

Nominal damages are distinguished from actual, substantial or compensatory damages and are given not as an equivalent for any wrong sustained but

in recognition of technical injury, and by way of declaring a right, and the amount of such damages must not exceed a trivial sum.

NOT GIVEN.

(Signed) C. N. PRAY,
Judge.

Gentlemen of the Jury:

In this case the Court instructs you as a matter of law that it does not appear from the evidence received in this case whether the plaintiffs could or would have prosecuted their alleged contract to completion at a profit to themselves, therefore your verdict will be for the defendant.

NOT GIVEN.

(Signed) C. N. PRAY,
Judge.

Gentlemen of the Jury:

In this case you will return a verdict against the plaintiffs and in favor of the defendant.

Thereupon, the jury retired to deliberate upon its verdict, and thereafter returned in open court with its verdict in words and figures, as follows, to wit:

(Title of Court and Cause.)

VERDICT.

We, the jury in the above-entitled court and action find our verdict in favor of the plaintiffs, Batt Tamietti, and Pete Gaido, and against the defendant and assess plaintiffs' damages in the sum of

Seven Hundred Seventy & 66/100 (\$770.66) Dollars, each.

(Signed) M. V. CONROY,
Foreman. [197]

Thereafter the Court ordered judgment to be entered upon the verdict in favor of Batt Tamietti and Pete Gaido in the sum of Seven Hundred Seventy & 66/100 (\$770.66) Dollars, each, besides costs of action.

Thereafter, and on the 6th day of December, 1924, judgment was duly and regularly entered on said verdict.

Thereafter, and on the 6th day of December, 1924, the defendant, upon request of counsel, was given thirty (30) days in addition to the time allowed by rule of court, within which to prepare, serve and file its proposed bill of exceptions herein.

And now, within the time allowed by rule and the orders of the Court, the defendant presents this its proposed bill of exceptions and prays that the same may be signed, settled and allowed.

Dated this 30th day of December, 1924.

WALKER & WALKER,
C. S. WAGNER,
Attorneys for Defendant,
Silver Bow Blk., Butte, Montana.

Service of the foregoing proposed bill of exceptions by copy admitted this 30th day of December, 1924.

H. A. TYVAND,
F. E. McCRACKEN,
Attorneys for Plaintiffs,
Silver Bow Blk., Butte, Montana.

This is to certify that the foregoing bill of exceptions tendered by the defendant, Crystal Copper Company, with the amendments proposed by plaintiffs annexed and filed Jan. 8, 1925, is true and correct in all particulars, and is hereby settled and allowed, and made a part of the record in this case.

Dated this 20th day of January, 1925.

CHARLES N. PRAY,

United States District Judge.

Filed Jan. 20, 1925. C. R. Garlow, Clerk. [198]

Thereafter, on January 20th, 1925, a prayer for reversal of judgment was filed herein, which prayer is in the words and figures as follows, to wit: [199]

In the District Court of the United States in and for the District of Montana.

No. 362.

LAWRENCE MONZETTI, PETE GAIDO, BATT
TAMIETTI, JOHN PAGLEERO, and
FRANK TAMIETTI,

Plaintiffs,

vs.

CRYSTAL COPPER COMPANY, a Corporation,
Defendant.

PRAYER FOR REVERSAL OF JUDGMENT.

To the Honorable, the Circuit Court of Appeals of
the United States for the Ninth District:

Now comes the Crystal Copper Company, the

plaintiff in error, and prays for a reversal of the judgment of the District Court of the United States for the District of Montana, which judgment was made, rendered and entered in the above-entitled cause and in the office of the Clerk of the District Court of the United States for the District of Montana, on the 6th day of December, 1924, in favor of defendants in error, Batt Tamietti and Pete Gaido, in the sum of seven hundred seventy and 66/100 (\$770.66) each, and against the Crystal Copper Company, the plaintiff in error.

C. S. WAGNER,
WALKER & WALKER,
Attorneys for Plaintiff in Error,
Silver Bow Blk., Butte, Montana.

Filed January 20th, 1925. C. R. Garlow, Clerk.
[200]

Thereafter, on the 20th day of January, 1925, an assignment of errors was filed herein, which assignment of errors is in the words and figures as follows, to wit: [201]

In the District Court of the United States for the
District of Montana.

LAWRENCE MONZETTI, PETE GAIDO, BATT
TAMIETTI, JOHN PAGLEERO, and
FRANK TAMIETTI,

Plaintiffs,

vs.

CRYSTAL COPPER COMPANY, a Corporation,
Defendant.

ASSIGNMENT OF ERRORS.

Now comes the plaintiff in error, the Crystal Copper Company, by Walker and Walker and C. S. Wagner, its attorneys, and in connection with its petition for a writ of error says that in the record, proceedings and in the final judgment, aforesaid, manifest error has intervened to the prejudice of the plaintiff in error, to wit:

I.

The Court erred in denying plaintiff in error's motion for a directed verdict at the close of all of the evidence in the case, which said motion is in words and figures, as follows:

The defendant now moves the Court to direct a verdict in favor of the defendant and against all of the plaintiffs on the grounds and reasons following:

First: There is a fatal variance between the allegations and the proof in this, that plaintiffs rely for a recovery upon the proposition as alleged in their complaint that the plaintiffs were and are a mining copartnership, engaged in mine subleasing [202] and subletting from the defendant Crystal Copper Company, whereas the proof affirmatively shows and discloses that the relationship of mining partners does not and never did exist between these parties in so far as their negotiations and work for the defendant was concerned, but that the proof affirmatively discloses that they were operating and working under a license and not a lease, and that their relationship was nothing more than that of a working agreement for a share of the profits.

There is a fatal variance because the parties, Lawrence Monzetti and the plaintiffs Pete Gaido and Batt Tamietti, if they have any cause of action at all against the defendant it would be as individuals for work, labor and services performed.

Next: That the evidence is insufficient in law to prove a mining copartnership between the plaintiffs in their relations with the defendant in this case. The evidence is insufficient to prove a lease between the plaintiffs and the defendants, and the evidence establishes if it establishes any contractual relationship at all, a contract embodying a license. The evidence is insufficient to establish a lease for the reason that a lease of the real property of a mining corporation may only be secured by compliance with the provisions of section 6004 of the Revised Codes of Montana, 1921, which requires affirmative approval of the stockholders and the board of directors.

Next: The evidence is insufficient to warrant a recovery by the plaintiffs or any of them, upon the theory that they are a mining copartnership because under the express provisions of section 8059 of the Revised Codes of Montana of 1921, the acts and deeds and things of a majority of the members of such partnership controls all acts of the partnership, and it affirmatively [203] appears in this case that a majority of the members of the so-called partnership have no interest in this litigation, and the same may not be maintained by a minority of the members.

Next: The evidence is wholly insufficient to prove any damages sustained by the plaintiffs or any of

them in the event the Court should hold that they were operating under a lease and not a license for the reason that the evidence pertaining to proof of prospective profits or damages by reason of the cancellation of the lease falls short of giving to the jury any tangible basis upon which to base any rational judgment as to damages, but that it would require speculation and conjecture to reach any verdict, and the same would be the result of mere guesswork having no foundation in the evidence in this case, particularly for the reason that there is no evidence showing or tending to show how long it would have required the plaintiffs to mine the ore in place which they contend they were deprived of mining, nor the cost of mining such ore nor the incidental expenses or work or labor necessary to prepare the ore for shipment, nor is there any evidence in this case showing what the ore if mined could have been smelted for, nor what proportion of the net profits of such ore proportionate of the net profits in dollars would accrue to the plaintiffs. There is no evidence before the Court showing what the market price of the metals contained in the ore and from which the plaintiffs would derive net proceeds was or would be.

Further, the contract contended for by the plaintiffs as alleged in their complaint is one void under the statute of frauds of the State of Montana, and the proof in this case discloses that the contract contended for in the complaint is not a lease but a working contract or license.

These matters being directed to the first count.

As directed to all of the evidence and to both counts of the complaint, the evidence wholly fails to show any measure of damage in that it fails to disclose the cost of removing the ore the plaintiffs claim they were deprived of mining or the number of men it would have been necessary to employ to remove it or how many of the partners or alleged partners, or the labor of how many of the partners or alleged partners would be required to remove it or the cost of the mining, would have been.

And for the further reason that the evidence wholly fails to disclose that the partnership as a mining partnership or otherwise, collectively or individually was ready, willing and able to perform its part of the contract alleged or would have performed it as a mining partnership or as individuals had they not been interrupted by the acts of the agent of the company.

II.

The Court erred in refusing to instruct the jury upon matters of law as requested by the plaintiff in error, as follows:

Gentlemen of the Jury:

In this case the plaintiffs claim that they entered into a contract or lease with the defendant corporation, Crystal Copper Company, whereby they were granted the exclusive right to mine certain territory embraced within the Goldsmith Mine located in Silver Bow County, Montana. In this connection you are instructed that the contract sued upon is in all essential features a contract for labor to be performed and to be paid for by a share of the profits

realized from such labor, and in this case it appears that the plaintiffs have been paid for all of the labor performed by them under said [205] contract from the profits realized from the ores mined by them, save and except the sum of \$11.43, due, owing and unpaid to the plaintiff Pete Gaido and a like sum to the plaintiff, Batt Tamietti, but these sums with accrued interest have been paid to the Clerk of the court for the use of the said plaintiffs prior to the beginning of this trial; therefore, your verdict will be against the plaintiffs and in favor of the defendants.

NOT GIVEN.

(Signed) C. N. PRAY,
Judge.

III.

The Court erred in refusing to instruct the jury upon matters of law as requested by the plaintiff in error, as follows:

Gentlemen of the Jury:

In this case if you find for the plaintiffs the Court instructs you that you may find for them no more than nominal damages which would include the \$28.00 deposited with the Clerk of the court in this case for the use and benefit of the plaintiffs, Batt Tamietti and Pete Gaido, together with such additional nominal sum as to you may seem just and meet in the premises.

Nominal damages are distinguished from actual, substantial or compensatory damages and are given not as an equivalent for any wrong sustained but in recognition of technical injury, and by way of de-

clarifying a right, and the amount of such damages must not exceed a trivial sum.

NOT GIVEN.

(Signed) C. N. PRAY,
Judge. [206]

IV.

The Court erred in refusing to instruct the jury upon matters of law as requested by the plaintiff in error, as follows:

Gentlemen of the Jury:

In this case the Court instructs you as a matter of law that it does not appear from the evidence received in this case whether the plaintiffs could or would have prosecuted their alleged contract to completion at a profit to themselves, therefore your verdict will be for the defendant.

NOT GIVEN.

(Signed) C. N. PRAY,
Judge.

V.

The Court erred in refusing to instruct the jury upon matters of law requested by the plaintiff in error, as follows:

Gentlemen of the Jury:

In this case you will return a verdict against the plaintiffs and in favor of the defendant.

NOT GIVEN.

(Signed) C. N. PRAY,
Judge.

VI.

The Court erred in failing to instruct the jury upon matters of law as contained in the exceptions

of the plaintiff in error to the charge of the Court as follows:

“Mr. WALKER.—If the Court please, to the charge to the jury of the Court, counsel for the defense on behalf of the defense, asks for a general exception and asks for a general and special exception for the failure of the Court to charge that the contract sued upon was a working agreement to be paid for by a share of the profits of the venture for which plaintiffs have already been paid. Second, that the Court erred in [207] failure to charge that under the evidence plaintiffs are limited to recover, if at all, only nominal damages. Third, for the failure of the Court to instruct the jury to return a verdict in favor of the defendant and against the plaintiffs. For further reason the Court erred in failure to instruct the jury that the contract between the parties, plaintiffs and defendant, was a license revocable at will, instead of a lease of ground for royalty.

VII.

The verdict and judgment are contrary to law.

C. S. WAGNER,

WALKER & WALKER,

Attorneys for Plaintiff in Error.

Silver Bow Blk., Butte, Mont.

Filed Jan. 20, 1925. C. R. Garlow, Clerk.

Thereafter, on the 20th day of January, 1925, a petition for writ of error was filed herein, which said petition is in the words and figures, as follows, to wit: [208]

In the District Court of the United States, in
and for the District of Montana.

No. 362.

LAWRENCE MONZETTI, PETE GAIDO, BATT
TAMIETTI, JOHN PAGLEERO, and
FRANK TAMIETTI,

Plaintiffs,

vs.

CRYSTAL COPPER COMPANY, a Corporation,
Defendant.

PETITION FOR WRIT OF ERROR.

To the Honorable CHARLES N. PRAY, Judge
of said Court:

Now comes the Crystal Copper Company, the defendant above named, by Walker & Walker and C. S. Wagner, its attorneys, and feeling itself aggrieved by the final judgment of this court entered against it and in favor of Batt Tamietti and Pete Gaido in the sum of seven hundred seventy and 66/100 dollars each, on the 6th day of December, 1924, hereby prays that a writ of error may be allowed to it from the United States Circuit Court of Appeals for the Ninth Circuit to the District Court of the United States for the District of

Montana, and in connection with this petition, petitioner herewith presents its assignment of errors.

Petitioner further prays that an order of super-seedeas may be entered herein and pending the final disposition of the [209] cause, and that the amount of security may be fixed by the order allowing the writ of error.

WALKER & WALKER and

C. S. WAGNER,

Attorneys for Plaintiff in Error.

409 Silver Bow Blk., Butte, Montana.

Filed January 20, 1925. C. R. Garlow, Clerk.

Thereafter on January 20, 1925, order allowing writ of error was duly signed, filed and entered herein, which said order is in the words and figures as follows, to wit: [210]

In the District Court of the United States for the
District of Montana.

No. 362.

LAWRENCE MONZETTI, PETE GAIDO, BATT
TAMIETTI, JOHN PAGLEERO, and
FRANK TAMIETTI,

Plaintiffs,

vs.

CRYSTAL COPPER COMPANY, a Corporation,
Defendant.

ORDER ALLOWING WRIT OF ERROR.

On reading the petition of the Crystal Copper Company, defendant above named, for writ of error and the assignment of errors, and upon due consideration of the record of said cause.

IT IS ORDERED that a writ of error be allowed from the United States Circuit Court of Appeals for the Ninth Circuit to United States District Court for the District of Montana as prayed for in said petition, and that said writ of error and citation thereon be issued, served and returned to the United States Circuit Court of Appeals for the Ninth Circuit in accordance with law, upon condition that the said petitioner and plaintiff in error, the Crystal Copper Company, give security in the sum of Two Thousand (\$2000.00) Dollars, that the said plaintiff in error shall prosecute said writ of error to effect, and if said plaintiff in error fail to make its plea good shall answer to the defendants in error for all costs and damages that may be adjudged or decreed on account of said writ of error.

And the said plaintiff in error now presents a bond in the sum of Two Thousand (\$2000,00) Dollars, with good [211] and sufficient surety. It is ORDERED that the same be and is hereby duly approved.

IN WITNESS WHEREOF, I have hereunto set my hand this *January* 20th day of *January*, 1925.

CHARLES N. PRAY,
Judge.

Filed January 20, 1925. C. R. Garlow, Clerk.

Thereafter, on January 20th, 1925, writ of error was filed herein, which said writ of error and answer of court thereto is hereto annexed and is as follows, to wit: [212]

In the District Court of the United States for the
District of Montana.

No. 362.

LAWRENCE MONZETTI, PETE GAIDO, BATT
TAMIETTI, JOHN PAGLEERO, and
FRANK TAMIETTI,

Plaintiffs,

vs.

CRYSTAL COPPER COMPANY, a Corporation,
Defendant.

WRIT OF ERROR.

United States of America,—ss.

The President of the United States of America,
to the Honorable CHARLES N. PRAY, One of
the Judges of the District Court of the United
States for the District of Montana, Sitting at
Butte, Montana, GREETING:

Because, in the records and proceedings, as also
in the rendition of the judgment of a plea which
is in the said District Court of the United States
for the District of Montana, at Butte, Montana,
before you, at the October term, 1924, thereof, be-
tween Lawrence Monzetti, Pete Gaido, Batt Tami-
etti, John Pagleero and Frank Tamietti, plaintiffs

and Crystal Copper Company, a corporation, defendant, a manifest error hath happened to the great damage of the said the Crystal Copper Company as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment [213] be therein given, that then, under seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, within 30 days from the date hereof, together with this writ, that the record and proceedings aforesaid being inspected the said United States Circuit Court of Appeals for the Ninth Circuit may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States this 26th day of January, 1925.

CHARLES N. PRAY,
U. S. District Judge, Montana.

[Seal] Attest: C. R. GARLOW,
Clerk of the District Court of the United States
for the District of Montana.

By C. G. Kegel,
Deputy Clerk.

Filed January 20th, 1925. C. R. Garlow, Clerk.

ANSWER OF THE COURT TO THE WRIT OF
ERROR.

The answer of the Honorable, the District Judges of the United States, District of Montana, to the foregoing writ.

The record and proceedings whereof mention is made, with all things touching the same, I certify under the seal of said District Court, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed, as within I am commended.

By the Court.

[Seal]

C. R. GARLOW,
Clerk.

By L. P. Polglase,
Deputy. [214]

[Endorsed]: No. 362. In the District Court of the United States for the District of Montana. Lawrence Monzetti, Pete Gaido, Batt Tamietti, John Pagleero, and Frank Tamietti, Plaintiffs, vs. Crystal Copper Company, a Corporation, Defendant. Writ of Error. Filed Jan. 20, 1925. C. R. Garlow, Clerk. By C. G. Kegell, Deputy. [215]

Thereafter, on January 23d, 1925, citation was filed herein, which citation is hereto annexed and is as follows, to wit: [216]

In the District Court of the United States for the
District of Montana.

No. 362.

LAWRENCE MONZETTI, PETE GAIDO,
BATT TAMIETTI, JOHN PAGLEERO,
and FRANK TAMIETTI,

Plaintiffs,

vs.

CRYSTAL COPPER COMPANY, a Corporation,
Defendant.

CITATION ON WRIT OF ERROR.

United States of America,—ss.

To Batt Tamietti and Pete Gaido, and to Messrs.
Tyvand & McCracken, Your Attorneys,
GREETINGS:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, within thirty (30) days from the date of this writ, pursuant to a writ of error duly allowed by the District Court of Montana and filed in the clerk's office of said court at Butte, Montana, on the — day of January, 1925, in a cause wherein the Crystal Copper Company, a corporation, the defendant above named, is plaintiff in error, and you, Batt Tamietti and Pete Gaido are plaintiffs in the above-entitled action and defendants in error, to show cause if any why the judgment rendered against the plaintiff in error as in the writ of

error mentioned should not be reversed, and why speedy justice should not be done to the plaintiffs in error in its behalf. [217]

WITNESS the Honorable CHARLES N. PRAY, Judge of the District Court of the United States in and for the District of Montana, this 20th day of January, 1925.

CHARLES N. PRAY,
District Judge.

[Seal]

Attest: C. R. GARLOW,
Clerk.

By C. G. Kegel,
Deputy Clerk.

Service of the within citation and receipt of copy is hereby admitted this 22d day of January, 1925.

H. A. TYVAND and
F. E. McCRACKEN,

Attorneys for Defendant in Error,
Silver Bow Blk., Butte, Montana. [218]

[Endorsed]: No. 362. In the District Court of the United States for the District of Montana. Lawrence Monzetti, Pete Gaido, Batt Tamietti, John Pagleero, and Frank Tamietti, Plaintiffs, vs. Crystal Copper Company, a Corporation, Defendant. Citation. Filed January 23, 1925. C. R. Garlow, Clerk. By L. P. Polglase, Deputy Clerk. [219]

Thereafter, on Jan. 20, 1925, supersedeas bond was filed herein as follows, to wit:

(Title of Court and Cause.)

SUPERSEDEAS BOND.

KNOW ALL MEN BY THESE PRESENTS: That we, Crystal Copper Company, a corporation, principal herein, and Fidelity & Deposit Company of Maryland, are held and firmly bound unto Batt Tamietti and Pete Gaido, in the full and just sum of Two Thousand (\$2,000.00) Dollars, lawful money of the United States, to be paid to the said Batt Tamietti and Pete Gaido, their heirs, executors, administrators, successors or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors or assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of December, 1924.

WHEREAS, in the October term of the above-entitled court, in a suit pending in said court between Lawrence Monzetti, Pete Gaido, Batt Tamietti, John Pagleero and Frank Tamietti, plaintiffs, and Crystal Copper Company, defendant, judgment was rendered against the said defendant, Crystal Copper Company, and in favor of Batt Tamietti and Pete Gaido, two of the plaintiffs above named, in the sum of Seven Hundred Seventy and 66/100 (\$770.66) Dollars each, and the said Crystal Copper Company, a corporation, defendant, has petitioned for a writ of error directed from the

United States Circuit Court of Appeals for the Ninth Circuit and citing and admonishing the said plaintiffs, Pete Gaido and Batt Tamietti, to be and appear in the United States Circuit Court of Appeals of the Ninth Circuit at San Francisco, [220] within thirty (30) days from and after the date of said citation;

NOW, the condition of the above obligation is such, that if the said plaintiffs in error, Crystal Copper Company, shall prosecute the said writ of error to effect and will pay the amount of said judgment and answer all damages and costs if it, the defendant, should fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

CRYSTAL COPPER COMPANY,

a Corporation. (Seal)

By THOMAS J. WALKER,

Its Attorney-in-Fact,

Principal.

FIDELITY & DEPOSIT COMPANY OF
MARYLAND,

By JOHN E. CORETTE,

Attorney-in-Fact.

J. S. HEILBRONNER,

Agent. (Seal)

The within and foregoing bond is hereby approved.

CHARLES N. PRAY,

United States District Judge.

O. K. as to amount.

H. A. TYVAND.

Filed Jan. 20, 1925. C. R. Garlow, Clerk. [221]

Thereafter, on Jan. 22, 1925, praecipe for transcript was filed as follows:

In the District Court of the United States in and
for the District of Montana.

No. 362.

LAWRENCE MONZETTI, PETE GAIDO,
BATT TAMIETTI, JOHN PAGLEERO,
and FRANK TAMIETTI,

Plaintiffs,

vs.

CRYSTAL COPPER COMPANY, a Corporation,
Defendant.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-styled Court:

Please prepare transcript in the above-entitled case, returnable to the Circuit Court of Appeals of the United States for the Ninth Circuit, and include therein the following papers, matters and things:

Plaintiffs' amended complaint.

Defendant's answer to plaintiffs' amended complaint.

Plaintiffs' reply to defendant's answer.

The bill of exceptions including transcript of the testimony as settled and allowed by the Court.

The verdict of the jury,

The judgment on the verdict.

Orders and minute entries of the court had in respect to the trial of said cause.

Plaintiffs' petition for writ of error.

Plaintiffs' assignment of errors and prayer for reversal.

Order granting writ of error.

The writ of error.

Citation and return thereon.

The certificate of the clerk of the court certifying to the correctness of the transcript when so prepared.

Dated this 22d day of January, 1925.

WALKER & WALKER,

C. S. WAGNER,

Attorney for Plaintiff in Error, the Crystal Copper Company, Defendant Above Named, 409 Silver Bow Block, Butte, Montana.

Filed Jan. 22, 1925. C. R. Garlow, Clerk. [222]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,

District of Montana,—ss.

I, C. R. Garlow, Clerk United States District Court in and for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 222 pages, numbered consecutively from 1 to 222 inclusive, is a full, true and correct transcript of the record and proceedings had in the within en-

titled cause, and of the whole thereof, required to be incorporated in said transcript by praecipe filed, as appears from the original records and files of said court in my custody as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original citation and writ of error issued in said cause.

I further certify that the costs of said transcript amount to the sum of Eighty-five and 10/100 Dollars (\$85.10), and have been paid by the plaintiff in error.

WITNESS my hand and the seal of said court at Butte, Montana, this — day of January, A. D. 1925.

[Seal]

C. R. GARLOW,
Clerk.

L. P. Polglase,
Deputy. [223]

[Endorsed]: No. 4486. United States Circuit Court of Appeals for the Ninth Circuit. Crystal Copper Company, a Corporation, Plaintiff in Error, vs. Pete Gaido and Batt Tamietti, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed February 3, 1925.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

